O/a 9-11-89

IN THE SUPREME COURT OF FLORIDA

GATOR FREIGHTWAYS, INC., and CLAIMS CENTER,

Petitioners,

vs.

ROLAND ROBERTS,

Respondent.

CASE NO.: 73,925

On Review of Decision of District Court of Appeal, First District, Under the Discretionary Jurisdiction of the Supreme Court of Florida

Respondent, ROLAND ROBERTS', Answer Brief on the Merits

Filed by:

DAVID A. SNYDER, ESQ.
Florida Bar No. 325929
Attorney for Respondent
2298 S. Dixie Highway
Miami, Fl 33133
(305) 856-9900
(305) 764-2522

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PREFACE

Respondent, ROLAND ROBERTS, will be referred to as ROBERTS or Respondent in this brief. Petitioners, GATOR FREIGHTWAYS, INC., and CLAIMS CENTER, will be referred to as GATOR or Petitioners.

All references to the record will appear as follows:

(R._____)

References to the appendix will appear as follows:

(App._____)

References to GATOR's Initial Brief will appear as follows:

(I.B._____)

STATEMENT OF THE CASE AND FACTS

CASE

GATOR's statement of the case is satisfactory.

FACTS

The third paragraph of GATOR's statement of facts is not sufficient to advise the Court of the facts coherently. Accordingly, ROBERTS submits the following clarified facts.

ROBERTS was driving a tractor leased by Lucious Reason to GATOR, and pulling a trailer owned by GATOR which was loaded with freight that was being transported pursuant to GATOR's bills of lading. ROBERTS was injured on June 23, 1986, as he was unloading an air conditioner from GATOR's trailer when the surrounding strapping wire broke causing ROBERTS to fall out of GATOR's trailer onto the pavement.

SUMMARY OF ARGUMENT

This appeal involves the interpretation and application of Florida Statute Section 440.10, commonly referred to as the "statutory employer doctrine." In order for a company to qualify as a contractor under section 440.10, its primary obligation in performing a job or providing a service must arise out of a contract. The critical language in this test is phrased in the active tense (i.e., performing, providing) and seeks to determine the source of the primary obligation when carrying out the job or service. The record and law in this case indicate that GATOR's primary obligations in performing the job or providing the service are controlled by and arise from the contract entered into by and between GATOR and its customers (i.e., bills of lading).

The second qualifying element which must be met in order for a company to be a statutory employer is that an essential portion of the contractor's contract be sublet to a subcontractor. The record herein clearly indicates that GATOR sublet essential and not incidental obligations under its contract.

The case law relied on by GATOR in successfully invoking this Court's discretionary jurisdiction on the grounds of direct and express conflict (Florida Power & Light v. Brown, 274 So.2d 558 (Fla. 3d DCA 1973) and Williams v. Pan American World Airways, Inc., 448 So.2d 68 (Fla. 3d DCA 1984) was incorrectly decided or is materially distinguishable from Roberts v. Gator Freightways, Inc., 538 So.2d 55 (Fla. 1st DCA 1989). In Brown and Williams the court's analysis improperly focused on the primary obligation of

the putative statutory employer as a company (i.e., public utility and airline, respectively), rather than determining the source of their primary obligation in performing a job or providing a service. Further, the Brown court's holding was partly based on the outdated notion that the application of section 440.10 was limited to construction contracts. The Williams' court also lent credence to this outdated notion.

Finally, policy considerations and the legislative intent behind section 440.10 mandate that the Roberts' decision was correct and therefore, this Court should affirm Roberts.

ARGUMENT

THE FIRST DISTRICT COURT OF APPEAL CORRECTLY RULED THAT GATOR IS THE STATUTORY EMPLOYER OF ROBERTS PURSUANT TO F.S. SECTION 440.10 BECAUSE GATOR'S PRIMARY OBLIGATION IN PERFORMING A JOB OR PROVIDING A SERVICE ARISES OUT OF A CONTRACT.

This appeal involves the interpretation and application of Florida Statute Section 440.10(1)(1985), commonly referred to as the "statutory employer doctrine", which states, in pertinent part:

> "In case a contractor sublets any part or parts of his contract work to a subcontractor or subcontractors, all of the employees of such contractor and subcontractor or subcontractors, engaged on such contract work shall be deemed to be employed in one and the same business or establishment; and the contractor shall be liable for and shall secure the payment of compensation to all such employees, except to employees of a subcontractor who has secured such payment."

It is well established that the Workers' Compensation Act should be broadly construed so as to provide coverage to claimants. Barrow v. Shel Products, Inc., 466 So.2d 281 (Fla. 1st DCA 1985); see also (I.B. 18).

In order for the putative statutory employer (i.e., GATOR) to be found liable under section 440.10, said employer must be found to be a contractor. This Court in Motchkavitz v. L.C. Bosss Industries, Inc., 407 So.2d 910 (Fla. 1981), defined a contractor as one under a contractual obligation to perform some work for another. See also Southern Sanitation v. Debrosse, 463 So.2d 420, 422 (Fla. 1st DCA 1985). Section 440.10 does not distinguish between an independent contractor, such as ROBERTS' employer, Lucious Reason, and a general contractor. Motchkavitz, supra at

914; Orama v. Dunmire Construction, Inc., 538 So.2d 532 (Fla. 1st DCA 1989).

Other courts have noted that in order for a company to qualify as a contractor under the statutory employer provisions of section 440.10 its primary obligation in performing a job or providing a service must arise out of a contract. Roberts v. Gator Freightways, Inc., 538 So.2d 55, 57 (Fla. 1st DCA 1989) (App. A); National Union Fire Insurance Co. v. Underwood, 502 So.2d 1325, 1327 (Fla. 4th DCA 1987); Southern Sanitation v. Debrosse, supra. The second qualifying element under this test is that an essential portion of the contractor's contract be sublet to a subcontractor. Southern Sanitation v. Debrosse, supra. GATOR's brief fails to address this second element which, in combination with the first element, prevents section 440.10 from being applied in an over broad manner. ROBERT's addresses this second element later in this brief.

In addition to the arguments made herein, ROBERTS incorporates the reasoning and findings relating to section 440.10 set forth in Roberts, supra.

GATOR is a shipping/trucking company generally known as a common carrier that attained and maintains its common carrier license and status pursuant to regulations set forth in 49 U.S.C. sections 10922 and 11101 et. **seq.** 49 U.S.C. section 11101 provides, in pertinent part, that a common carrier "shall provide the transportation or service on reasonable request." (emphasis

added) This statute and GATOR's license thereunder merely requires GATOR to **"offer"** its transportation services to the public generally. Roberts, supra, at **58** and **59**. Persons or companies desiring to employ GATOR's services accept GATOR's offer by entering into a contract known as a bill of lading. It is that contract that controls the specifics of the undertaking and the relationship between the parties and serves as the basis for a damage suit in the event of breach by either party. Roberts at **59**.

The critical language of the first element of the recognized legal test to be applied in determining whether GATOR qualifies as a contractor under section 440.10 is whether GATOR's primary obligation in "performing a **job"** or "providing a service" arises out of a contract. This critical language is phrased in the active tense (i.e., performing a job or providing a service). This test clearly seeks to determine the source of the primary obligation when carrying out the job or service. If GATOR's primary obligation in carrying out the job or service arises from the bill of lading (i.e., contract), GATOR satisfies the first element in determining whether GATOR is a contractor for purposes of section 440.10. When performing a transportation job or providing a transportation service, GATOR does not look to 49 U.S.C. section 10922 and 11101 **et.** seq. to determine when it is obligated to perform the job or provide the service, where it is obligated to perform the job or provide the service, how it is obligated to perform the job or provide the service (i.e., C.O.D., F.A.S.,

F.O.B., refrigerated, ventilated, palletized, hazardous product precautions, etc.) or how much it will charge to perform the job or provide the service. See also Roberts at 59, footnote 2. All of these obligations in performing the job or providing the service are controlled by the contract entered into by and between GATOR and its customers.

Without these contracts GATOR would have only the statutory requirement to offer its transportation services to the public generally. Therefore, this statutory requirement is not the source of GATOR's primary obligation in performing a job or providing a service.

GATOR argues in its Initial Brief that its primary obligation to "operate as a common carrier derives from statutory and common law" and not contract, therefore, GATOR is not the statutory employer of ROBERTS. (I.B. 9, 10) This argument misstates the crucial language of the applicable test and therefore fails to address the proper issues. Although GATOR's brief does at one point correctly state the first element of the applicable test and cite the applicable case law, it incorrectly concludes and argues that in order to determine the status of a particular company in relation to a claimant "there must be an analysis of the primary obligation of the company." (emphasis supplied) (I.B. 10)

In support of this argument GATOR cites Florida Power & Light Co. V. Brown, 274 So.2d 558 (Fla. 3d DCA 1973) as a case which "applied this analysis." (I.B. 10) Since Brown did employ this

improper analysis, it was incorrectly decided and GATOR's reliance thereon is misplaced. The Brown court employed the following, improper analysis:

> "The primary obligation of F.P.L., as a public utility, to provide power to its customers in the case before us did not arise out of a contract between the Fashion Square and F.P.L., even assuming such a contract existed. [3 F.P.L.'s primary obligation arises out of a statute rather than a contract." (emphasis supplied)

Brown at 560.

The Brown court's analysis improperly focused on the primary obligation of F.P.L. as a company (i.e., a public utility), rather than determining the source of F.P.L.'s primary obligation in "performing a job or providing a service."

ROBERTS also maintains that Brown was incorrectly decided as the holding was based on the outdated notion that the application of section 440.10 is limited to construction contracts. Brown at 560-561; see p. 6, infra.

Alternatively, Brown is materially distinguishable from the case at bar, therefore, GATOR's reliance thereon is misplaced for the following reasons set forth by the Roberts court:

> "Different law governs the relationships of a power company exercising an exclusive franchise for supplying electric power to the public and a trucking company operating as a common carrier. In the Brown case, the court found that there was no contract between FP&L and its customer, Pompano Fashion Square, and that FP&L's duties were predicated entirely upon statute. [3 A trucking company's duties to its customers, as we have seen above, are primarily based on contract law; for a trucking company, whether a common carrier or

> a contract carrier, enters into a contract specifying the terms of its undertaking with each of its customers, and such contract can be customized to meet the specific needs of the customer."

Roberts at 59.

Brown is further distinguishable (if not incorrectly decided as argued supra) as the court therein followed a 1962 decision by the First District Court of Appeal, State ex. rel. Auchter Co. v. Luckie, 145 So.2d 239 (Fla. 1st DCA), cert. denied, 148 So.2d 278 (Fla. 1962), which narrowly construed this Court's decision in West v. Sampson, 142 So.2d 74 (Fla. 1962) as indicating, although not holding, section 440.10 as applicable only to building construction contracts. Brown at 560. The dissenting opinion in Luckie, supra, accurately pointed out that:

> "Such a narrow interpretation does not seem to meet the legislative intent, nor does it appear to meet prior interpretations which have clearly stated that the purpose is to protect employees of irresponsible and uninsured contractors. [Stone v. Buckley, 132 So.2d 613 (Fla. 2d DCA 1961)]"

Luckie at 245.

Since the Luckie decision the First District Court of Appeal has consistently declined to limit the application of section 440.10 to construction contracts. See Belford Trucking Co. v. Pinson, 360 So.2d 1140 (Fla. 1st DCA 1978) (trucking company deemed statutory employer); Southern Sanitation v. Debrosse, 463 So.2d 420 (Fla. 1st DCA 1985) (garbage disposal company held to be a statutory employer of an employee of company hired to haul dirt to

its landfill); Barrow v. Shel Products, Inc., 466 So.2d 281 (Fla. 1st DCA 1985) (trucking company was statutory employer of driver of truck leased by employer from owner/operator); Wooden v. Ploof Truck Lines, Inc., 482 So.2d 611 (Fla. 1st DCA 1986) (trucking company may be statutory employer of a driver of a leased truck); Roberts, supra (common carrier was statutory employer of truck leased by employer from owner/operator). ROBERTS believes that the First District's consistent interpretation of section 440.10 is of some import as it has exclusive jurisdiction of final orders in Workers' Compensation cases. F.S. Section 440.271 and Fla.W.C.R.P. 4.160. Even the Third District Court of Appeal, in a decision prior to Brown, has declined to limit the application of section 440.10 to construction contracts. Hart v. National Airlines. Inc., 217 So.2d 900 (Fla. 3d DCA 1969) (airline/common carrier may be a statutory employer when it is under contract with a third person to perform a job or provide a service for that third person).

Brown is further distinguished from Roberts as the Brown opinion does not hold that *any* statute which pertains to a company will automatically act as the source of its primary obligation or will supersede contracts which dictate how, when and where the company will be performing the job or providing the service. Petitioners clearly interpret Brown in an over broad manner. The court's opinion in Roberts makes it clear that not just any statute which may pertain to a company will be deemed to be the source of its primary obligation in performing a job or providing a service.

The Roberts' court employed a well developed legal analysis to determine whether GATOR's primary obligation in performing a job or providing a service arose from a statute or whether a contract relationship existed which was the source of its primary obligation in performing a job or providing a service and which superseded any peripheral statute.

GATOR also relies on Williams v. Pan American Airways, Inc., 448 So.2d 68 (Fla. 3d DCA 1984). The Williams' court held that Pan American was not a statutory employer under sections 440.10 and 440.11 because its primary obligation in transporting passengers luggage arose from generalized statutory and common law requirements that it do so. Williams at 69. The Williams' court set forth two (2) reasons in support of its holding. First, it relied on the "controlling case of Brown." Williams at 69. For that reason, Williams was incorrectly decided or is distinguishable from Roberts for the same reasons set forth in the above analysis which rejected Brown or distinguished Roberts from Brown. Further distinguishing Williams from Roberts is the fact that the Williams' court incorrectly interpreted Brown by stating that a "single express written agreement to supply electricity to a shopping center was involved." Williams at 69. The Brown court found no such contract. Brown at 560-561; Roberts at 59. The second reason set forth by the Williams court in support of its holding was that the sublet work of handling baggage was "incidental" to the contract to transport the passengers themselves (i.e., airline

ticket). Williams at 70. Williams can again be distinguished because the sublet work in Roberts was an indispensable and not incidental portion of GATOR's contractual obligation. GATOR contracted with each customer to transport goods. GATOR would sublet these contracts (i.e., bills of lading) to Lucious Reason who, along with ROBERTS, would perform most, if not all, of the contracted for services. Williams can further be distinguished as the opinion lent credence to the outdated notion that exclusive-remedy-compensation-immunity should not exist outside construction contracts. Williams at 69.

In the appellate court below and in the instant proceeding, ROBERTS contends that his claim should be controlled by Roberts, supra, and Barrow v. Shel Products, Inc., supra, and cases cited therein, among others. In Barrow the claimant was driving a tractor-trailer rig that had been leased to Shelton Trucking (i.e., Shel Products, Inc.) by Forrest Elder, the owner operator of the tractor-trailer. Elder and the claimant therein had delivered a load of dog food to a store in Miami and were apparently on their way to pick up another load when the accident occurred. The court held that Shelton Trucking was a section 440.10 statutory employer of the driver-claimant. GATOR unsuccessfully argued to the First District Court of Appeal (and argues here) that Barrow was distinguishable because it involved a contract carrier, whereas GATOR is a common carrier required to serve the public generally by providing transportation or service upon reasonable request

pursuant to 49 U.S.C. sections 10922 and 11101 et. seq. (In so arguing, GATOR impliedly concedes that Barrow was correctly decided and that section 440.10 should not be limited to construction contracts, but that it should be limited to contract carriers. Therefore, GATOR's reliance on Brown cannot extend to that portion of the Brown opinion which restricts the application of section 440.10 to construction contracts as the Brown court also based its holding on its finding that negotiations between FP&L and the Fashion Square did not result "in the type of contractual obligation contemplated by the statutes [i.e., construction contract]." Brown at 560-561. For this reason and reasons set forth previously, Brown has limited precedential value, if any.) GATOR contrasted, as it does here, contract carriers and common carriers and argued its primary obligation in performing a job or providing a service arises not from the bills of lading, but from a statutory obligation as a common carrier to provide transportation and service to the general public pursuant to 49 U.S.C. section 10922 and 11101 et. seq. The Roberts' court thoroughly analyzed this argument and rejected it thusly:

> "We are unable to discern the logic and factual basis for creating a distinction between "common carriers" and "contract carriers" as the sole legal basis for exempting Gator Freightways from the status of a statutory contractor under section 440.10, as construed in Barrow v. Shel Products, Inc. Neither claimant nor his employer Reason was engaged in the business of a common carrier; Gator Freightways held that license, and the **license merely required Gator to offer its transportation services to the public generally.** That license did not displace the

contract of carriage necessarily created between Gator and its customers whenever Gator accepted goods for transport. The law is well established that

> where property is delivered to and accepted by a carrier for transportation without an express contract, the law implies a contract that it shall be carried to and delivered at the place of destination in accordance with and subject to the terms and conditions fixed by law.
>
> Ordinarily, the contract is embodied in the shipping receipt or bill of lading, but this does not constitute the entire contract; rather, such receipt or bill and the operative tariffs and schedules constitute the entire contract of carriage. Nor does the issuance of a bill of lading necessarily supersede or nullify a prior contract, oral or written, which is complete in itself, unless it was the intention of the parties to treat the prior contract as merged into the later written agreement.
>
> A common carrier may contract with shippers for a single transportation or for successive transportations, subject to a change of rates in the manner provided by law. Also, a common carrier who undertakes for himself to perform an entire service may employ a subordinate agency, although he cannot constitute another person or corporation the agent of the consignor or consignee.

13 Am.Jur.2d Carriers Section 226 (1964) (emphasis added). Furthermore,

> A carrier is under an obligation imposed by law to accept and carry goods offered for transportation when a proper tender thereof is made. Where, however, the carrier

> has accepted goods for carriage, or has agreed to furnish cars or loading space or to perform any other specific item of service, a contractual relationship arises, the obligations of which are reciprocal, and either party may sue in the event of a breach.
>
> 13 Am.Jur.2d Carriers Section 231 **(1964).** Thus, notwithstanding the carrier's obligation to carry goods offered by the general public for transport, **each such undertaking must be performed in accordance with the contract made between the parties,** whether that contract covers a specific trip or is continuing in nature so as to cover successive trips.
>
> In this case, the critical error in Gator's argument lies in the assumption that Gator's primary obligation to perform services arises not from contracts but from its statutory obligation as a common carrier to provide transportation and service to the general public pursuant to Chapter **49,** United States Code. No doubt Gator must comply with the applicable federal law; but it is also quite clear that in offering its services under that law, Gator nevertheless must enter into contracts of carriage in every instance of transporting a customer's goods. It is that contract of carriage that controls the specifics of the undertaking and the relationship between the parties and serves as the basis for a damage suit in the event of breach by either party. That contract may also impose special, customized obligations on the carrier, so long as they are not in violation of applicable statutes. Thus, it is simply not correct to characterize Gator's relationship with its customers as being governed solely or primarily by statute."
> (underline emphasis original, bold emphasis added)

Roberts at **58-59.**

With respect to the issue of legislative intent behind section 440.10 and its impact on this case, this Court has recognized that:

"It is manifest that the purpose of Section

> **440.10(1)** is to protect employees of irresponsible and uninsured subcontractors by imposing ultimate liability on the general contractor who has it within his power to insist upon adequate compensation protection for employees of his subcontractors."

Fidelity Construction Co. v. Arthur J. Collins & Son, Inc., 130 So.2d **612, 614** (Fla. **1961).**

Eleven (11) years prior to Fidelity Construction, supra, this Court held that the liability of a contractor under section **440.10** shall exist whether or not the subcontractor has the status of being an independent contractor. Miami Roofing and Sheet Metal Co. v. Kindt, **48** So.2d **840, 842** (Fla. **1950).** The Kindt court opined this result was consistent with legislative intent:

> **"As** any other interpretation would result in inequalities among the workmen on the same job, all of whom are, in fact, engaged in fulfilling the general contractor's contract work, even though some of the workmen are responsible, insofar as the method of accomplishing the work is concerned, only to their own immediate employer. The interpretation contended for by plaintiff would also enable a general contractor to escape liability under the Act by doing through independent contractors what it would otherwise do through direct employees. [citations omitted]"

Kindt at **843.**

The Roberts court opined that the purpose of section **440.10 is:**

> "To insure that a particular industry will be financially responsible for injuries to those employees working in it, even though the prime contractor employs an independent contractor to perform part or all of its contractual undertaking."

Id. at **60.**

Most recently, the First District Court of Appeal stated:

> "The very purpose of section 440.10 is to assure that a general contractor will retain financial responsibility for injuries to those employees working a contract job, even though an independent contractor performs part or all of the undertaking. Roberts v. Gator Freightways, Inc., 538 So.2d at 60; Barrow v. Shel Products, Inc., 466 So.2d at 282."

Orama v. Dunmire Construction. Inc., 538 So.2d 532 (Fla. 1st DCA 1989)

In Belford Trucking Co. v. Pinson, supra, the First District Court of Appeal addressedthe legislative intent and purpose behind section 440.10 in a factual setting in which Belford Trucking had subcontracted with H & H Refrigerator Trucking Service ("H & H") as subcontractor and H & H was the employer of the deceased employee. The subcontractor, H & H, failed to secure workers' compensation coverage. Belford appealed an order from the Circuit Court entered pursuant to Florida Statute section 440.24 which directed Belford to pay costs and attorney's fees to claimant. In interpreting sections 440.10 and 440.42(3) the court stated:

> "The intent and purpose of these provisions is to secure prompt payment of all amounts due to, or on behalf of, the claimant without regard to the primary or secondary responsibility of several employers/carriers and their rights to reimbursement.
>
> In this case, the additional factor of Belford's responsibility and acceptance of the risks in subcontracting with H & H, a subcontractor without workers' compensation coverage, requires Belford pay these fees and costs, as it has all prior benefits, and seek reimbursement from its subcontractor."

Id. at 1142.

In the instant action, the additional factor of GATOR's responsibility and acceptance of the risk in subcontracting with Lucious Reason, a subcontractor without workers' compensation coverage, requires GATOR to pay benefits, fees and costs to ROBERTS and seek reimbursement, if available, from its subcontractor.

In further support of its holding, the Roberts' court stated that to construe section 440.10 as argued by GATOR would afford common carriers such as GATOR a "convenient loophole through which to avoid the requirements of workers' compensation coverage on many drivers delivering loads pursuant to the carriers' contracts with its customers." Roberts at 60. GATOR addresses this rationale in its brief and argues that it "ignores the realities of the business of common carriers and a much more significant and genuine policy consideration for a limitation upon the applicability of section 440.10." (I.B. 17) GATOR cites no authority in support of this proposition. GATOR then cautions that if said section was to apply to contracts by which service relationships are created "such as that involved in this case, it will be difficult, if not impossible, to define the limits of the immunity of section 440.11." (I.B. 17) GATOR's fear is unfounded in law or in fact. GATOR fails to cite or refer to the second element in the legal test which must be satisfied in order to find the statutory contractor liable under the statute. The second requirement for liability under the statute is that a portion of the contractor's contract be sublet to a subcontractor. To sublet is to pass to

another an obligation under a contract for which the person so subletting is primarily obligated. Orama v. Dunmire Construction. Inc., supra; Southern Sanitation v. Debrosse, supra. The sublet obligation under the contract must be an **"essential"** one. Southern Sanitation v. Debrosse at 442. Under GATOR's contract with its customers it is primarily obligated to provide, among other things, the following in performing a job or providing a service: tractors, trailers, trucks, drivers, pickups, deliveries, loading and/or unloading of trailers or trucks and equipment to load and/or unload trailers or trucks. GATOR, in the instant case, sublet to Lucious Reason, a subcontractor who employed ROBERTS, the essential obligations of providing the tractor, trailer, driver, pickup service, delivery service, loading, unloading and hauling the trailer, among others. GATOR clearly sublet essential and not incidental obligations under its contracts (i.e., bills of lading).

In further support of its unsubstantiated argument that application of section 440.10 should be limited, GATOR argues that it would be "extraordinarily difficult" for common carriers to provide economical workers' compensation insurance for employees of its independent owner/operators stating that frequently common carriers would not be in possession of information that such employees exist or how much they are paid. (I.B. 17) The record does not support this argument with respect to GATOR. Testimony revealed that GATOR has 189 independent contractor owner/operators in Florida and Georgia (R.119) and that GATOR does not "have that

many owner/operators that have second trucks" (i.e., employee drivers).(R. **142)** Testimony also revealed that GATOR employs the same qualification process with an employee driver of an owner/operator as it does for an owner/operator or a direct employee. (R. **121-122)** Therefore, GATOR is aware of every employee driver employed by any of its owner/operators. In fact, ROBERTS parked the tractor at GATOR's terminal every night (R. 70) and reported for work every morning at GATOR's terminal. (R. **96)** Further, GATOR's driving qualification form inquires into ROBERTS "expected earnings." (R. **252)** GATOR also kept track of ROBERTS' daily pickups and deliveries. (R. **262)** GATOR also had access to, gained possession of and introduced into evidence ROBERTS' payroll records. (R. **265-266)** ROBERTS filled out an employment application (R. **252-254),** underwent a written examination (R. **255-256),** a medical examination (R. **257)** and a road test (R. **258-260),** all at GATOR's request. These documents and all the information contained therein were maintained by GATOR. In all likelihood GATOR has the same information in its possession with respect to the few other employees of owner/operators. From this evidence it is clear that no extraordinary difficulty would be visited upon common carriers such as GATOR if this Court affirms the Roberts decision. GATOR could resolve this allegedly "extraordinarily difficult" task by simply refusing to allow owner/operators to hire employees, require owner/operators with employees to prove they have secured and maintain workers' compensation coverage or require owner/operator

employees to sign independent contractor agreements.

For the foregoing reasons Respondent, ROLAND ROBERTS, respectfully requests this Court to affirm the decision in Roberts v. Gator Freightways, Inc., 538 So.2d 55 (Fla. 1st DCA 1989).

CONCLUSION

Based on the law and argument contained herein Respondent, ROLAND **ROBERTS, respectfully requests this Court to affirm the decision in** Roberts v. Gator Freightways, Inc., **538 So.2d 55 (Fla. 1st DCA 1989).**

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 24th day of July, 1989 to: Henry T. Wihnyk, Esquire, 2620 Hollywood Boulevard, Hollywood, Florida 33020 and Ronald Hock, Esquire, P.O. Box 3391, Tampa, Florida 33601-3391.

LAW OFFICES OF DAVID A. SNYDER
Attorneys for Respondent
2298 South Dixie Highway
Miami, Florida 33133
(305) 856-9900 (Dade)
(305) 764-2522 (Broward)

By: DAVID A. SNYDER, ESQ.