C/O 9-11-89

23

IN THE SUPREME COURT OF FLORIDA

CASE NO. **73, 925**

FLORIDA BAR NO. **509590**

GATOR FREIGHTWAYS, INC.
and CLAIMS CENTER,

Petitioners,

vs.

ROLAND ROBERTS,

Respondent.

PETITIONERS' INITIAL BRIEF

ON THE MERITS

ON REVIEW OF DECISION OF DISTRICT COURT OF APPEALS FIRST DISTRICT, UNDER THE DISCRETIONARY JURISDICTION OF THE SUPREME COURT OF FLORIDA

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BY: _____
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GATOR.BRF/mls

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PREFACE

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

All references to the record will appear as follows:

(R.____)

References to the appendix will appear as follows:

(App.____)

STATEMENT OF CASE AND FACTS

CASE

Respondent, ROLAND ROBERTS, was the claimant in a workers' compensation action heard by Deputy Commissioner, The Honorable Alan M. Kuker, on February 9, 1987. The Deputy Commissioner entered a Final Order on April 27, 1987, denying ROBERTS' claims. (R. 269). ROBERTS appealed from this Order resulting in the decision of the First District Court of Appeal, reported as Roberts v. Gator Freightways, Inc., 538 So.2d 55 (Fla. 1st DCA 1989). This decision affirmed the Deputy Commissioner's Order on one ground but reversed on another. Rehearing as to the reversal was denied on February 23, 1989.

Petitioners timely filed a Notice To Invoke Discretionary Jurisdiction in this Court on the ground that Roberts directly conflicts with Florida Power and Light Co. 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). This Court accepted jurisdiction to consider the merits of the case. This Court has jurisdiction pursuant to Art. V. 3(b)(3), Fla. Const.

FACTS

GATOR is a common carrier of general commodities operating in Florida and Georgia under Certificates of Public Convenience and Necessity issued by the Interstate Commerce Commission. (R. 108-111). In testimony before the Deputy Commissioner, Jerome Johns, the President of GATOR, contrasted the business of GATOR a common carrier with that of a contract carrier. According to this testimony, a

common carrier is required to serve the general public upon reasonable request and is controlled by tariffs and regulations of the Interstate Commerce Commission and the Department of Transportation. A contract carrier carries goods on a contract basis, usually for two to three shippers, and without any obligation to the general public. (R. **108-111).**

To obtain services which are required in the general operation of its business, GATOR leases trucks and tractors from independent contractors known in the trucking industry as owner-operators. (R. **112).** Leases, as opposed to other possible types of arrangements, are necessary, among other reasons, so that GATOR'S ICC number can be used on the equipment. (R. **113).**

Lucious Reason, ROBERTS' employer (R. **101),** is one such owner-operator for GATOR, leasing his trucking equipment to GATOR under the terms of a Lease Agreement which was admitted in evidence. (R. **10, 244-250).** ROBERTS was injured on the job on June **23, 1986,** while employed by Reason driving Reason's truck, pulling freight for GATOR. (R. **101, 270).**

ROBERTS filed his claim for Workers' Compensation benefits against GATOR on July **2, 1986.** (R. **148).** GATOR defended on grounds that there was no employer/employee relationship between it and ROBERTS because ROBERTS was an independent contractor or the employee of an independent contractor. (R. **271).** ROBERTS argued that either he was an employee of GATOR in the conventional sense or that he was a "statutory employee" pursuant to **§ 440.10** Fla. Stat. (R. **275).**

Final hearing was held on February 9, 1987. A Final Order favorable to GATOR was rendered on April 27, 1987. (R. 269). In the Final Order the Deputy Commissioner denied benefits to ROBERTS finding that ROBERTS was neither an "employee" nor a "statutory employee" of GATOR. (R. 269).

Concerning the "statutory employee" issue the Deputy Commissioner found:

> 13. Both parties concede that in order for Gator Freightways to qualify as a contractor for purposes of the statutory employer doctrine, its "primary" obligation in performing a job or providing a service must arise out of a contract...I find that Gator Freightways' primary obligation to perform services arises not from contract but from its statutory and common-law obligation as a certified common carrier to provide transportation services to the general public pursuant to 49 U.S.C. §§ 10922 and 11101 et. seq. (Emphasis in original) (R. 278).

This Final Order was appealed to the First District which affirmed the finding that ROBERTS was not an employee of GATOR but reversed the finding that GATOR was not ROBERTS' statutory employer. Roberts v. Gator Freightways, Inc., 538 So.2d 55 (Fla. 1st DCA 1989). The court ruled that despite the fact that GATOR was a common carrier subject to 49 U.S.C. §§ 10922 and 11101 et. seq., its primary obligation in providing services arises out of contracts. Thus, according to the court, it should be treated legally as a statutory contractor under § 440.10.

POINT ON APPEAL

WHETHER THE FIRST DISTRICT COURT INCORRECTLY RULED THAT GATOR IS THE STATUTORY EMPLOYER OF ROBERTS PURSUANT TO § 440.10 WHERE THE PRIMARY OBLIGATION OF GATOR TO OPERATE AS A COMMON CARRIER DERIVES FROM STATUTORY AND COMMON LAW AND NOT THE INCIDENTAL CONTRACTS UNDER WHICH IT PERFORMS ITS SERVICES FOR THE GENERAL PUBLIC.

SUMMARY OF ARGUMENT

In Roberts v. Gator Freightways, Inc., 538 So.2d 55 (Fla. 1st DCA 1989), the district court reversed the ruling of the Deputy Commissioner and held that GATOR was the statutory employer of ROBERTS. The court ruled that despite the fact that GATOR was a common carrier subject to 49 U.S.C. §§ 10922 and 11101 et. seq., its primary obligation in providing services arises out of contracts. Thus, it should be treated legally as a statutory contractor under § 440.10. A review of Florida law, the applicable Florida and federal statutes and the record reveals that this decision, directly conflicting with Florida Power and Light Co. 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), is an erroneous application of the "statutory employer" doctrine. Therefore, the decision should be quashed.

To determine whether a company is the statutory employer of a claimant, there must be a determination of the source of the company's primary obligation for the service or work it performs. If that primary purpose is from contract, then the company is a contractor and it will be considered the statutory employer of an employee of a subcontractor of the company. The record and law in this case supports a finding that GATOR is not the statutory employer of ROBERTS.

In Brown and Williams the Third District found that FP&L and Pan American Airlines were not contractors for the purposes of this determination because the primary obligation for the performance of

their services arose from statutory and common law and not the incidental contracts under which they performed these services. The statutory language establishing and regulating GATOR as a common carrier is indistinguishable from the statutory language concerning the companies in Brown and Williams. Thus, as in those two cases, the primary obligation for GATOR is derived from the statutory provisions under which it operates as a common carrier.

The Roberts court's analysis over emphasizes the importance of the bills of lading that, as contracts, are incidental to GATOR'S providing a service. As with the contracts in Brown and Williams, although they were a natural outgrowth of the obligation to provide a service to the general public and were necessary to its fulfillment, they were not the force behind the primary obligation to perform the particular service. While bills of lading are issued and form a "contract" of sorts, the relationship between the shipper, carrier and consignor are governed by complex statutes and regulations and by the tariff of the carrier. The issuance of a bill of lading is incidental to the obligation and serves more to evidence the existence of a relationship, the obligations of which are separately established, than to establish obligations for the parties.

This conclusion is underscored by the legal nature of common carriers and their obligation to perform their services for the general public subject to liability if they unreasonably refuse to perform. Contract carriers, however, may operate to the convenience of the particularities of individual contracts with individual

customers. Unlike contract carriers, common carriers are restricted to equally serve all members of the general public.

The First District refused to recognize this distinction for the purposes of this inquiry and, thus, relied on case law involving contract carriers to support its ruling. This reliance is misplaced because it is undisputed that the source and impact of the obligations under which the two types of carriers operate are very different and create fundamental differences in their obligations. Therefore, contrary to the First District's analysis, the distinction is essential and illustrative as to why GATOR is not a contractor for the purposes of § 440.10.

Finally, the Roberts court expressed concern that a decision in GATOR'S favor would create loopholes for common carriers to use to avoid workers' compensation responsibilities. However, this ignores the important policy to limit the applicability of § 440.10 to avoid placing a heavy burden on common carriers that routinely employ the owner-operator system to provide economical workers' compensation insurance protection for the employees of its independent owner-operators.

ARGUMENT

THE FIRST DISTRICT COURT INCORRECTLY RULED THAT GATOR IS THE STATUTORY EMPLOYER OF ROBERTS PURSUANT TO § 440.10 BECAUSE THE PRIMARY OBLIGATION OF GATOR TO OPERATE AS A COMMON CARRIER DERIVES FROM STATUTORY AND COMMON LAW AND NOT THE INCIDENTAL CONTRACTS UNDER WHICH IT PERFORMS ITS SERVICES FOR THE GENERAL PUBLIC.

In Roberts v. Gator Freightways, Inc., 538 So.2d 55 (Fla. 1st DCA 1989), the district court reversed the ruling of the Deputy Commissioner and held that GATOR was the statutory employer of ROBERTS. The court ruled that despite the fact that GATOR was a common carrier subject to 49 U.S.C. §§ 10922 and 11101 et. seq., its primary obligation in providing services arises out of contracts. Thus, it should be treated legally as a statutory contractor under § 440.10. A review of Florida law, the applicable Florida and federal statutes and the record reveals that this decision, directly conflicting with Florida Power and Light Co. 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), is an erroneous application of the "statutory employer" doctrine. Therefore, the decision should be quashed.

The district court, in Roberts, reversed the Final Order of the Deputy Commissioner which found that GATOR'S primary obligation to perform services arises not from contract but from its statutory and common-law obligation as a certified common carrier to provide transportation services to the general public pursuant to 49 U.S.C. §§ 10922 and 11101 et. seq. The court reasoned that GATOR must enter

into contracts in order to provide its services and that these contracts provide the specifics for the undertaking of the services. Hence, it is the district court's conclusion that GATOR'S license as a common carrier did not displace the individual contracts entered between it and its customers and, thus, its contractual rather than statutory and common-law obligations are primary and should determine its status as a statutory employer. In forming this conclusion, the court rejected GATOR'S and the Deputy Commissioner's distinction between contract carriers and common carriers for the purposes of this determination. However, contrary to the court's ruling, the law is clear that GATOR'S primary obligation does arise from statutes and common law establishing and regulating common carriers. Thus, GATOR is not the statutory employer of ROBERTS. Therefore, the district court was incorrect in reversing the Deputy Commissioner's Order.

To be considered the statutory employer of a claimant pursuant to § 440.10 a company must be a contractor operating under the contractual obligation to perform work or service for another. To qualify as a contractor its primary obligation in providing a service or performing a job must arise out of a contract. Brown: Southern Sanitation v. Debrosse, 463 So.2d 420 (Fla. 1st DCA 1985). Thus, 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.

In Brown, the Third District, determining that Florida Power and Light was not entitled to immunity under the Workers' Compensation law, applied this analysis and ruled that FP&L was not the statutory employer of the employee of an independent contractor hired by FP&L to

perform certain work pursuant to negotiations and agreements between FP&L and its customer, Pompano Fashion Square. The district court stated that FP&L's primary obligation, as a public utility, to provide power to the public did not arise from an incidental contract with the shopping center but, rather, arose from § 366.03 Fla. Stat. The court noted that although there was no evidence of a contract between FP&L and the Fashion Square beyond negotiations and agreements, the status of FP&L would be the same assuming the contracts existed.

In Williams, the employee of a business that had contracted with Pan American Airlines to handle the baggage of Pan Am's passengers sought damages from the airline for injuries received on the job. The airline attempted to invoke workers' compensation immunity on the ground that it was a "contractor" which had sublet work and, thus, was the statutory employer of the plaintiff. The district court disagreed, ruling that the primary obligation of the airline in transporting passengers' luggage did not arise from the individual contracts with the passengers, but, rather, from common law and statutory requirements that it do so. Therefore, the airline was not the plaintiff's statutory employer for the purposes of § 440.10.

In Brown and Williams, the Third District acknowledged the existence of contracts or agreements that concerned the activity underlying the service provided by the entity under analysis. However, the court recognized that despite the existence of the contracts or agreements, common law or statute provided the basis for the particular obligation of the entity.

In Brown, FP&L's obligation was to provide power to the public. This obligation derived from statutory law, particularly § 366.03 Fla. Stat. providing:

> 'Each public utility shall furnish to each person applying therefor reasonable sufficient, adequate and efficient service upon terms as required by the commission...' (emphasis added).

Brown, at 560.

In Williams, Pan American's obligation was to transport passengers and their baggage. This obligation derived from common law and 49 U.S.C. § 1374 which, among other things, provides:

> (a)(1) It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable reauest therefor...to provide safe and adequate service, equipment and facilities in connection with such transportation... (emphasis added).

The Third District concluded that the existence of the agreements or contracts did not render the particular entities "contractors" for the purposes of § 440.10 because of the primary obligations set forth in the particular state and federal law.

In Roberts, the First District acknowledged the existence of GATOR'S undisputed status as a common carrier under its license and pursuant to 49 U.S.C. §§ 10922 and 11101 et. seq., but ruled that the individual contracts with its customers established its primary obligation. The court refused to find that the license and the federal statutes established GATOR'S primary obligation as a certified common carrier to provide service to the general public.

However, the statutory language that imposes the obligation upon GATOR as a common carrier is indistinguishable from the language

in the statutes that impose the primary obligations in Brown and Williams. 49 U.S.C. § 11101 provides as follows:

> (a) A common carrier providing transportation of service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide the transportation or service on reasonable request. In addition, a motor common carrier shall provide safe and adequate service, equipment and facilities. (emphasis added).

Thus, as in Brown where FP&L had the primary obligation to provide power to each person reasonably requesting service, and in Williams where Pan Am was obligated to provide safe transportation upon reasonable request, here GATOR, as a common carrier, is under the primary obligation to provide safe and adequate service upon reasonable request.

Unlike the Third District in Brown and Williams, the First District, in Roberts, viewed the individual contracts (bills of lading) as determining GATOR'S status, stating that the existence of the common carrier license did not displace the contracts with GATOR'S customers. However, just as the various contracts in Brown and Williams were not displaced by the statutory language that dictated the primary obligation, the bills of lading need not be displaced here by the common law and statutory law in order for it to establish GATOR'S primary obligation to provide transportation upon reasonable request.

The Roberts court's analysis over emphasizes the importance of the bills of lading that, as contracts, are incidental to GATOR'S providing a service. As with the contracts in Brown and Williams, although they were a natural outgrowth of the obligation to provide a

service to the general public and were necessary to its fulfillment, they were not the force behind the primary obligation to perform the particular service. Gator's primary obligation to perform services arises from its obligation as a certificated common carrier to provide transportation services to the public. 49 U.S.C. §§ 10922 and 11101, et. seq. While bills of lading are issued and form a "contract" of sorts, the relationship between the shipper, carrier and consignor are governed by complex statutes and regulations and by the tariff of the carrier. The issuance of a bill of lading is incidental to the obligation and serves more to evidence the existence of a relationship, the obligations of which are separately established, than to establish obligations for the parties. See, Williams, supra.

This conclusion is underscored by the legal nature of common carriers and the distinction between common carriers and contract carriers. A common carrier performs its services for all the public within the limits of its capacity. Bound to serve all who request its services, the common carrier is subject to liability for refusal to perform without sufficient reason. Ruke Transport Line, Inc. v. Green, 156 So.2d 176 (Fla. 1st DCA 1963); Orlando Transit Co. v. Florida Railroad and Public Utilities Commission, 160 Fla. 795, 37 So.2d 321 (1948). The duty and obligations of a common carrier are very different from that of a contract carrier.

> A common carrier must serve all of the general public who seek its service on an equal basis. It may not set aside part of its equipment for certain customers to the exclusion of others. Its liability as to the freight it transports is that of an insurer. Its contracts usually consist of the terms and conditions in the uniform bill of lading plus the provisions of its published

> tariffs. A contract carrier on the other hand can devote equipment to the exclusive needs of one shipper. His liability is that of a bailee unless modified by a special contract. He can guarantee a rate for a fixed period and so enable the shipper to bid on contracts to furnish the commodity to be hauled on the basis of a known freight charge over the period of the contract. He can offer special service, such as that at unusual hours or that of insuring complete performance of the shipper's contract by personal attention to recurring need for shipments. He can become, to some extent, an integral part of the shipper's organization.

Green, at 179 quoting Baltimore Tank Lines v. Public Service Commission, 215 Md. 125, 137 A.2d 187 (1957).

This language from the First District demonstrates the fundamental differences between common carriers and contract carriers and the obligations under which they operate. While a contract carrier is free to operate to the convenience of the particularities of individual contracts with individual customers, a common carrier is restricted to "contractual" terms that equally serve all members of the general public seeking its services.

Interestingly, in Roberts, the First District refused to view this difference as significant for the purposes of determining whether GATOR was ROBERTS' statutory employer. Apparently the court saw no logic to this distinction merely to justify its refusal to distinguish Barrow v. Shel Products, Inc., 466 So.2d 281 (Fla. 1st DCA 1985) from this case. However, Barrow certainly is distinguishable from this case because the facts indicate that the trucking company involved there was a contract rather than common carrier. The logic of the distinction between the two for the purposes of the determination of statutory employer status is illustrated by the

language from Green, quoted above. The obligations and restrictions on the flexibility of the operations of GATOR and the carrier in Barrow are indisputably different and are derived from very different sources, GATOR'S from 49 U.S.C. §§ 10922 and 11101 et. seq. and the carrier's in Barrow from the individual contract between the carrier and the customer. Thus, contrary to the First District's analysis of the facts in Roberts, Claimant and his employer, Reason, were performing the primary obligations of GATOR as established by statutory and common law rather than the incidental bills of lading, just as the "subcontractors" in Brown and Williams performed the primary obligations of FP&L and Pan American.

In addition to relying on Barrow the First District also relied on Hart v. National Airlines, Inc., 217 So.2d 900 (Fla. 3d DCA) cert. denied, 225 So.2d 533 (Fla. 1969) in reaching its decision in Roberts. In that case National defended a personal injury action brought by an employee of an independent contractor which had entered into a written contract with National to furnish men to load and unload cargo and mail from its planes. "National, pursuant to the terms of the contract, had the same supervision and control over [Plaintiff] as it exercised over its own employees." Hart, at 900. The Court found that National had a contract with the United States government to carry mail; it subcontracted the loading and unloading of the mail to the subcontractor; and that the employee of the subcontractor was injured by an employee of National while both were in the performance of loading and unloading mail. Under those circumstances National was found to be within the protective

provisions of § 440.11. The Court did not find that National was a "statutory employer," but held only that National was not a "third party tortfeasor" and that the remedy provided in the statute was exclusive. The holding could have been based either on a finding that the Plaintiff was an employee of National, that National was a "statutory employer," or that National was protected by the "single enterprise" rule. Based upon more recent authority, the case would probably have been decided differently.

To further support its decision the First District advanced the rationale that to construe § 440.10 as argued by GATOR would afford GATOR and other common carriers a "convenient loophole through which to avoid the requirement of workers' compensation coverage on many drivers delivering loads pursuant to the carrier's contracts with its customers." Roberts, at 60. This argument 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 § 440.10. If § 440.10 were to apply to contracts or engagements 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 § 440.11. As a practical matter, it would be extraordinarily difficult for common carriers (which rely extensively on the independent owner-operator system) to provide economical workers compensation insurance protection for the employees of its independent owner-operators. Frequently, information would not be available that such employees exist, much less the amount or extent of their compensation. The Courts should not place such a burden on

the owner-operator system, a system which the Courts have recognized has a legitimate business purpose. See, Hilldrup Transfer & Storage of New Smyrna Beach v. State Department of Labor, 447 So.2d 414 (Fla. 5th DCA 1984).

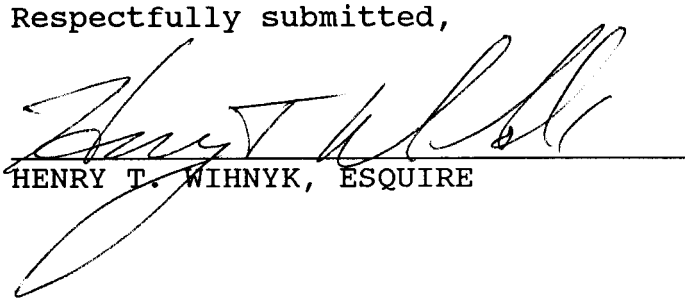
GATOR recognizes that the First District, in Barrow, paraphrasing the well established rule, said "the workers compensation act should be broadly construed so as to provide coverage to claimants." Barrow, at 282. The Court did not say and the rule does not provide, however, that all persons who file claims should recover or that the statutory employer doctrine should be extended to include the employees of every business with whom a businessman contracts to provide products or services which it is his business to provide to others.

The decision of the Deputy Commissioner was correct and should be affirmed en toto. Therefore, Roberts should be quashed to the extent that it reverses the Deputy Commissioner's Order.

CONCLUSION

Based on the law and argument contained herein Petitioners, GATOR FREIGHTWAYS, INC. and CLAIMS CENTER, respectfully request this Court to quash the decision of the First District to the extent that it reverses the Order of the Deputy Commissioner, thereby affirming the Order en toto.

Respectfully submitted,



HENRY T. WIHNYK, ESQUIRE

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed/hand-delivered this 3rd day of July, 1989, to: **RONALD HOCK, ESQUIRE, P. O.** Box 3391, Tampa, Florida 33601-3391; **DAVID A. SNYDER, ESQUIRE, 2298 South Dixie Highway, Miami, Florida 33133.**

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