

O/a 9-11-89

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IN THE SUPREME COURT OF APPEAL

CASE NO. 73,925

FLORIDA BAR NO. 509590

GATOR FREIGHTWAYS, INC.,
and CLAIMS CENTER,

Petitioners,

vs.

ROLAND ROBERTS,

Respondent.

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SID J. WHITE
AUG 18 1989
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Deputy Clerk

PETITIONERS' REPLY 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

CONROY, SIMBERG & LEWIS, P.A.
Attorneys for Petitioner
2620 Hollywood Boulevard
Hollywood, Florida 33020
(305) 921-1101 (Broward)
(305) 940-4821 (Dade)

BY: [Signature]
HENRY T. WIHNYK, ESQUIRE

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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

Petitioner relies on its statement as presented in its Initial Brief.

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.

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.

Respondent, ROBERTS, in his Answer Brief contends that the First District Court correctly decided Roberts v. Gator Freightways, Inc., 538 So.2d 55 (Fla. 1st DCA 1989) arguing that the Third District incorrectly decided the two cases in conflict with Roberts, 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). Thus, Respondent argues that there is no legal or policy support for finding that a common carrier is not a statutory employer pursuant to § 440.10. These arguments are without merit.

Respondent initially contends that GATOR has incorrectly analyzed the legal test for determining whether an entity is a statutory employer under § 440.10. However, Respondent's analysis is an exercise in semantics merely focusing on the tense of the words "performing" and "providing" in order to determine the source of GATOR'S primary obligation. Moreover, Respondent's analysis is completely unsupported by any authority.

Respondent asserts that GATOR does not look to common law or statute to determine its obligations. According to Respondent, GATOR'S individual contracts with its customers establish its primary obligations. Respondent and the court, in Roberts, fail to acknowledge and address the fact that these contracts are incidental

in that they merely provide the means for GATOR to fulfill its primary obligation of providing transportation to the general public upon reasonable request. Respondent and the First District attempt to dismiss the importance of the mandatory language of 49 U.S.C. § 11101, providing that a common carrier "shall provide the transportation or service on reasonable **request**," asserting that the statute merely requires GATOR to "**offer**" its services. This ignores the fact that under common law and the statutes regulating common carriers GATOR is subject to liability even without the proof of negligence or breach of contract for violation of this duty expressed in § 11101. **See, Johnson v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.**, 400 F.2d 968 (9th Cir. 1968); **John Morrell & Co. v. Frozen Food Express, Inc.**, 700 F.2d 256 (5th Cir. 1983). Moreover, GATOR, as a common carrier must comply with the other sections of the statute or face severe civil and criminal penalties. **See**, 49 U.S.C. § 11901 et. seq.

This underscores the difference between GATOR, as a common carrier, and other companies that are merely contract carriers. This also underscores the fallacy of ROBERT'S and the First District's contention that there is no logical reason to differentiate between the two. Moreover, it demonstrates the error in ROBERT'S and the First District's reliance on **Barrow v. Shel Products, Inc.**, 466 So.2d 281 (Fla. 1st DCA 1985). GATOR'S obligations, duties and liabilities are far more extensive and severe than those of a contract carrier only subject to liability for negligence and breach of contract. **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); Johnson; John Morrell & Co.; 49 U.S.C. § 11901 et. seq. 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. Thus, contrary to Respondent's and the First District's analysis of the facts in Roberts, Respondent 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.

Respondent applies his fallacious analysis to argue that Brown and Williams were incorrectly decided. Respondent defies logic and reason to argue that FP&L's primary obligation does not arise from the applicable common law and statutes asserting, without any support, that it is improper to focus on the obligations of FP&L as a company.

Moreover, Respondent completely ignores the fact that the statutes involved in those two cases which provide the primary obligations to FP&L and to Pan Am are virtually identical to the statute involved here. These statutes establish the primary obligation of the particular company without displacing, as the Roberts court would require, individual contracts necessary to the fulfillment of the obligation.

Notwithstanding the actual differences between the nature of the business and obligations of common carriers and contract carriers, Respondent, as well as the First District, seem to contend that there is no justification for treating a common carrier differently from a

carrier that is not governed by the common law and statutes concerning the business of common carriers. However, Respondent certainly could not disagree that the importance of common carriers to commerce and the economy makes it necessary to closely regulate them and to place upon them limitations and obligations not shared by others. This alone warrants different treatment.

Respondent also complains that any decision other than that reached in Roberts would allow GATOR to take advantage of a "loophole" and, thus, violate the liberal spirit of the Florida Workers' Compensation Act. There is no dispute that the spirit of the law favors compensation for injured workers. However, this should not mean that the law must be interpreted to provide compensation under all circumstances. If that were true then there would never be a need for intervention of the courts because every claim would be paid.

Respondent also maintains that claimants would be left without a remedy if not permitted to obtain workers' compensation benefits from the common carriers under these circumstances. This argument is without merit. Although a claimant may not be able to obtain workers' compensation benefits from the common carrier where it is not the statutory employer, the claimant may still maintain a tort action, as did the claimants in Brown and Williams, because the workers' compensation immunity would not apply to bar such an action. Hence, a remedy is still available despite the finding that the common carrier is not a statutory employer.

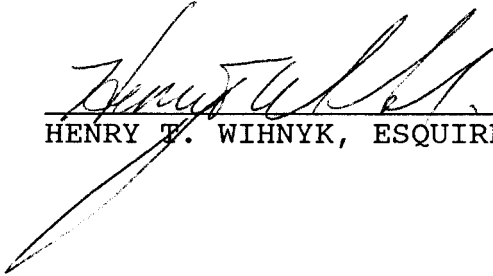
The decision of the Deputy Commissioner was correct and

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 in the Initial Brief and 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 1st day of August, 1989, to: RONALD HOCK, ESQUIRE, P. O. Box 3391, Tampa, Florida 33601-3391; DAVID A. SNYDER, ESQUIRE, 2298 south Dixie Highway, Miami, Florida 33133.

CONROY, SIMBERG & LEWIS, P.A.
Attorneys for Petitioner
2620 Hollywood Boulevard
Hollywood, Florida 33020
(305) 921-1101 (Broward)
(305) 940-4821 (Dade)

BY: 
HENRY T. WIHNYK, ESQUIRE

GATOR.RPY/mls