NO. 04-0993

IN THE

SUPREME COURT

OF TEXAS

GOODYEAR TIRE AND RUBBER COMPANY,

Petitioner,

V.

PATRICK MAYES,

Respondent.

PETITIONER'S BRIEF

Robert C. Scruggs
Texas Bar No. 17933500
KING, LeBLANC & BLAND, P.L.L.C.
7500 San Felipe, Suite 800
Houston, Texas 77063
Tel. (713) 334-5644
Fax (713) 334-5828

**ATTORNEYS FOR PETITIONER,
GOODYEAR TIRE AND
RUBBER COMPANY**

NO. 04-0993

GOODYEAR TIRE AND RUBBER COMPANY,

Petitioner,

V.

PATRICK MAYES,

Respondent.

IDENTITY OF PARTIES & COUNSEL

---

1. Goodyear Tire and Rubber Company
Robert C. Scruggs
Texas Bar No. 17933500
King, LeBlanc & Bland, P.L.L.C.
7500 San Felipe, Suite 800
Houston, Texas 77063
Tel. (713) 334-5644
Fax (713) 334-5828

2. Patrick Mayes
Valorie W. Davenport
Texas Bar No. 05419500
Denise W. Novotny
Texas Bar No. 00797165
Davenport Legal Group
440 Louisiana, Suite 1210
Houston, Texas 77002
Tel. (713) 655-1500
Fax (713) 655-0077

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

NO. 04-0993

GOODYEAR TIRE AND RUBBER COMPANY,

Petitioner,

V.

PATRICK MAYES,

Respondent.

PETITIONER'S BRIEF

Petitioner, Goodyear Tire and Rubber Company, submits its brief. Petitioner will be referred to as "Goodyear." Respondent, Patrick Mayes, will be referred to as "Mayes."

STATEMENT OF THE CASE

Nature of the case. Goodyear was the owner of a vehicle being driven by Corte Adams ("Adams") that was involved in a collision with a vehicle being driven by Mayes. Mayes filed suit against Adams and Goodyear, contending (1) that Adams was in the course and scope of his employment with Goodyear at the time of the accident and (2) that Goodyear negligently entrusted its vehicle to Adams.

Proceedings in the trial court. The lawsuit was filed in the 269th District Court, Harris County, Texas, the Honorable John T. Wooldridge presiding.

The judgment of the trial court. Judge Wooldridge signed a summary judgment in favor of Goodyear on November 1, 2002. Judge Wooldridge had previously signed an order consolidating Plaintiff's claims against Defendants; subsequent to the summary judgment, Judge Wooldridge signed an order granting de-consolidation.

Proceedings in the court of appeals. Mayes appealed the judgment to the Houston Court of Appeals for the First District of Texas. Mayes was the appellant, and Goodyear was the appellee.

The opinion of the panel. The panel that decided the case was composed of Justices Sam Nuchia, Terry Jennings and Evelyn Keyes. The Court of Appeals rendered its judgment and issued an opinion on June 10, 2004.

a. Justice Keyes authored the opinion for the majority.

b. Justice Jennings wrote a dissenting opinion.

c. The opinion of the Court of Appeals can be found at 144 S.W.3d 50 (Tex. App.—Houston [1st Dist.] 2004).

d. Goodyear timely filed a motion for rehearing, which was denied by the court of appeals on September 24, 2004.

The judgment of the court of appeals. The court of appeals reversed the judgment of the trial court, finding that fact issues existed precluding summary judgment for Goodyear on Mayes' claims based upon *respondeat superior* and negligent entrustment.

STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction over this appeal because the court of appeals has committed an error of law of such importance to the state's jurisprudence that it should be corrected. Tex. Gov't Code §22.001(a)(6).

The Supreme Court has jurisdiction over this appeal because it is a case in which the justices of the court of appeals disagree on a question of law material to the decision. Tex. Gov't Code §22.001(a)(1); *see Christensen v. Integrity Ins. Co.*, 719 S.W.2d 161, 162 (Tex. 1986).

ISSUES PRESENTED FOR REVIEW

Issue 1: Was Corte Adams outside the course and scope of his employment as a matter of law at the time of the accident?

Issue 2: Do the facts establish as a matter of law that Goodyear Tire & Rubber Company did not negligently entrust its vehicle to Corte Adams on the occasion in question?

STATEMENT OF FACTS

The majority opinion of the court of appeals correctly states some of the facts of this case, but is incorrect in several crucial particulars, and omits some facts relied upon by Goodyear. Thus, Goodyear respectfully presents this summary of corrected facts and facts omitted from the majority opinion of the court of appeals.

1. Adams was not "on the clock" between leaving the Houston store in the evening and arriving there the following morning

The majority opinion incorrectly states that "When he had a delivery or pick-up, Adams was 'on the clock' for Goodyear until he either dropped the tires off at the Houston shop in the evening or arrived at the Houston shop in the morning to pick up tires." *Mayes v. Goodyear Tire and Rubber Co.*, 144 S.W.3d 50, 53 (Tex. App.—Houston [1st Dist.] 2004). In fact, Adams did not remain "on the clock" until arriving at the Houston shop the following morning. Instead, when he had tires to drop off at the Houston ("Homestead") store, if that store would be closed before he could arrive there, he went "off the clock" when he left the Bryan store and he would not go back "on the clock" until arriving at the Homestead store the following morning. (CR 56[1], 59[2]). If arrangements had been made for someone to stay late at Homestead, he would go "off the clock" when he left the Homestead store. (CR 61[3]). Thus, in no event would Adams have remained "on the clock . . . until he . . . arrived at the Houston shop in the morning . . . ."

[1] Page 51, lines 16-23, Adams' second deposition (May 28, 2002).
[2] Page 64, lines 3-17, Adams' second deposition.
[3] Page 70, lines 7-25, Adams' second deposition.

In determining that a fact issue exists regarding whether Adams was in the course and scope of his employment "*despite being on a personal errand . . .*" at the time of the accident, the majority opinion states that Adams "was 'on the clock' when he was making deliveries . . . ." *Mayes* at 56. Thus, the majority apparently indicates that Adams was "on the clock" and making a delivery at the time of the accident.

The record states clearly and unequivocally to the contrary: Adams "had been off work either from 5:30 p.m. (the day before the accident) or 7:00 p.m. that day, depending on whether arrangements had been made for Homestead to stay open late . . . ." (CR 64[4]). Adams never drank beer and then drove a Goodyear truck on company business. (CR 64[5]). It was not part of Adams' job to visit with his father at his father's home. (CR 64[6]). The latest time of day that Adams ever worked for Goodyear was 9:30 at night. (CR 64[7]). Adams was never on the job for Goodyear at 3:00 in the morning. (CR 64[8]).

Adams was not on the job at the time of this accident, when he was driving from his father's home at 3:00 a.m. to the store to pick up cigarettes for him. (CR 65[9]). He was not expecting to be paid for that time. (CR 65[10]). <u>At the time of the accident, Adams was not on the job for Goodyear, and "had been off the clock since, at the very latest, 7:00 Friday evening before this wreck . . . ."</u> (CR 65[11]) (emphasis added).

---

[4] Page 82, lines 9-13, Adams' second deposition.
[5] Page 82, lines 14-20, Adams' second deposition.
[6] Page 82, line 23-page 83, line 7, Adams' second deposition.
[7] Page 83, line 18-page 84, line 2, Adams' second deposition.
[8] Page 84, lines 12-14, Adams' second deposition.
[9] Page 85, lines 9-13, Adams' second deposition.
[10] Page 85, lines 14-16, Adams' second deposition.
[11] Page 85, line 22 –page 86 line 3, Adams' second deposition

2. Adams did not intend to drive home after buying cigarettes at 3 a.m.

The majority opinion also incorrectly states that after Adams stopped at a convenience store to get some cigarettes for his father, he intended to "drive home, change clothes, and head for the Houston shop on his way to Bryan to begin work at 6:00 a.m." *Mayes* at 53-54. There is no evidence in the record to support this rendition of Adams' intended activities after purchasing the cigarettes for his father. Instead, Adams was going to get [his father] a pack of cigarettes and bring them back to him. (CR 63[12]) (emphasis added). The erroneous rendition of Adams' supposedly intended activities on the morning of the accident appears to stem from pages 5 and 6 of Appellant's Brief, where Appellant asserts similar "facts" that have no support in the record.

3. Adams did not testify that Goodyear authorized workers' compensation payments

The majority opinion incorrectly states that Adams testified in his first deposition "that someone at Goodyear had helped him fill out the forms to obtain (workers' compensation) payments" as a result of the accident and that Goodyear authorized workers' compensation payments for Adams for the injuries that he received in the accident. *Mayes* at 57. Instead, Adams testified that he received workers' compensation payments following the accident, and that he met with a Goodyear representative before receiving these payments. (CR 178-179). There is no testimony that Goodyear helped Adams fill out forms to obtain these payments or that Goodyear authorized them.

[12] Page 80, lines 10-25, Adams' second deposition.

4. Description of Adams's job duties

The majority opinion omits the following facts regarding Adams' job duties, although the dissent accurately summarizes them: Adams was hired by Goodyear as a tire service technician, after which he was promoted to alignment technician. (CR 88). His job duties included changing tires, fixing flats, general tire service, and alignments. (CR 88). Also, he occasionally picked up or dropped off Goodyear's tires. (CR 89−90).

SUMMARY OF THE ARGUMENT

Well-settled Texas law provides that an employee driving an employer's vehicle with the employer's permission, while on a personal errand rather than on a mission for the benefit of the employer, is not in the course and scope of employment. Adams' trip to purchase cigarettes for his father at 3:00 a.m. was a personal errand that in no way benefited Goodyear. Therefore, Adams was not in the course and scope of his employment with Goodyear at the time of the accident as a matter of law.

Furnishing a vehicle to a licensed driver who gives no indication of being impaired at the time of entrustment does not constitute negligent entrustment. When Adams left the Goodyear Bryan store after an average work week at 5:33 p.m. on the afternoon before the 3:00 a.m. accident the following morning, Goodyear had no indication that he was an unsafe driver, or that he would decide to drive the vehicle some nine and a half hours later after consuming some beer and when he may have been too tired to do so safely.

The facts are quite simple. Adams was provided a Goodyear truck to drive between the Goodyear store in Bryan and his home in Houston. Goodyear knew that Adams had a valid driver's license and did not have a driving record which would cause concern with his abilities to operate the Goodyear truck.

Occasionally, Adams would transport tires between Goodyear's Houston and Bryan stores. Adams was paid for the time he spent transporting the tires (approximately two hours) between these stores; he was never paid for the time between leaving the Houston store in the evening and arriving at the Houston store the following morning.

On the afternoon of February 26, 1999, Adams left the Bryan store. At the time that he left the Bryan store, he was in no discernable condition that would warrant preventing him from driving the truck. That is, he left the Bryan store in the same condition he had on all previous occasions. Adams was headed to the Houston store with some tires to deliver before heading home for the evening. Adams arrived at the Houston store after-hours (approximately 7:00 p.m.) and therefore did not deliver the tires. Rather than going home to retire for the night, Adams went to his father's house where he ate dinner, drank some beers, and fell asleep. For whatever reason, and certainly without providing any benefit whatsoever to Goodyear, and without any request from Goodyear that he do so, he awoke at 3:00 a.m. and headed for a convenience store to buy cigarettes for his father, after which he intended to return to his father's house to deliver the cigarettes. While en route to the convenience store, Adams fell asleep and collided with the vehicle driven by Mayes. Adams had no intention of reporting to the Houston store until at least three hours later, i.e., after 6:00 a.m.

The law is clear that in factual scenarios such as this, the employee is outside the course and scope of his employment when the accident occurs. All cases cited by the lower court and Plaintiff support this result. Further, when Goodyear entrusted the truck to Adams the day before the accident, Adams was a licensed, fully competent and safe driver. Goodyear did not entrust the truck to Adams under circumstances that would in any way suggest to Goodyear, or any reasonable person, that Adams was incompetent to drive.

ARGUMENT

The lower court has failed to properly apply the law to the facts of this case on either issue – (1) course and scope and (2) negligent entrustment.

1. Was Corte Adams Outside the Course and Scope of His Employment as a Matter of Law at the Time of the Accident?

In order for an employer to be held liable under a theory of course and scope, the employee's act must be (1) within the employee's general authority, (2) in furtherance of the employer's business, and (3) taken for the accomplishment of the object for which the employee was hired. *Robertson Tank Lines, Inc. v. Van Cleave*, 468 S.W.2d 354, 357 (Tex. 1971) (emphasis added); *Wrenn v. G.A.T.X. Logistics, Inc.*, 73 S.W.3d 489, 493 (Tex. App.—Fort Worth 2002, no pet.); *Soto v. El Paso Natural Gas Co.*, 942 S.W.2d 671, 680 (Tex. App.—El Paso 1997, writ denied). Although the majority of the court below cited the above legal requirements, the majority failed to apply them to the facts of this case. Had it done so, it would have been clear that Adams was not acting in the course and scope of his employment at the time of the accident.

a. In Furtherance of the Employer's Business

As the dissent below correctly stated, "it is undisputed that Adams' 3:00 a.m. trip to the convenience store to buy cigarettes for his father – coming after dinner, 'a few beers,' and several hours of sleep at his father's house – was strictly personal." *Mayes* at 59 (Jennings, J., dissenting). These personal actions by Adams in no way furthered his employer's (Goodyear's) business. The majority below failed to address whether these "strictly personal" actions furthered Goodyear's business.

1. Lower Court Cited Facts Not Relevant to the Analysis

Rather than applying the legal requirements, the lower court attempted to create an issue of fact by pointing out facts not exactly relevant to the analysis. For example, the majority points out that Goodyear requested that Adams make deliveries. *Mayes* at 55. Goodyear does not dispute this fact; however, whether Goodyear asked Adams to make deliveries is immaterial. What is important is whether Adams's actions at the time of the accident were in response to his employer's request and thereby furthered Goodyear's business. Adams was not making deliveries for Goodyear at 3:00 a.m. when he drove to the convenience store to get his father cigarettes and was involved in the accident. Thus, he was not furthering Goodyear's business as required by this Court in *Robertson.*

The majority below also believed that the requirement that Adams carry a pager at all times somehow presents an issue of fact which should defeat summary judgment. *Mayes* at 56. However, the lower court fails to cite to a single case that being on-call

confers course and scope status. On the contrary, the case law is clear that being on-call does not confer course and scope status.

In *J & C Drilling Co. v. Salaiz*, 866 S.W.2d 632 (Tex. App.—San Antonio 1993, no writ), an employee was on call 24 hours per day, but was not required to be on site 24 hours per day. He was allowed to go home as long as he remained available by telephone or radio. The court held that the mere fact that the employee was on call 24 hours per day was not sufficient to raise a fact issue concerning whether he was in the course and scope of his employment at the time of the accident made the basis of the lawsuit. *Id.* at 637.

Likewise, an employee who was subject to being called to duty at any time but who was not called for overtime prior to the accident was not found to be in the course and scope of his employment. "The mere fact that he was subject to call does not establish that he was acting in the course and scope of employment at the time of the accident." *Smith v. Garza*, 432 S.W.2d 142, 144 (Tex. Civ. App.—Houston [1st Dist] 1968, no writ). For the purpose of determining course and scope status, Goodyear submits that carrying a pager is factually indistinguishable from being "on call."

The lower court also mentions that "Adams had responsibility and control over the Goodyear tires in his truck when the accident happened and intended to deliver them to the Houston shop before reporting to work in Bryan on the morning of the accident." *Mayes* at 55. Neither possession of an employer's property nor an intention to deliver it to the employer on a future occasion have any bearing on the issue of course and scope of employment.

Adams' possession of Goodyear's tires cannot be a source of course and scope exposure. Possession of an employer's vehicle is not determinative according to *Robertson*; otherwise, operation of an employer's vehicle at the time of an accident would constitute a conclusive determination of course and scope rather than merely raising a rebuttable presumption. Since Adams' possession of Goodyear's truck does not confer course and scope status, the additional possession of Goodyear's tires cannot do so either. Otherwise, every employee in possession of an employer's property, such as a company car, briefcase, laptop computer, pager, cell phone, file or even office supplies would be in course and scope of employment 24 hours per day until surrendering possession of the employer's property. In light of the *Robertson* analysis, this is clearly not the law in Texas.

Likewise, Adams' intention to deliver the tires to Goodyear later that day does not change the analysis of this case under *Robertson*. The essential factor is the purpose of Adams' trip at the time of the accident rather than the purpose of some future trip. The facts unequivocally establish that Adams was on a cigarette-buying mission for his father rather than any mission for Goodyear. Even inferring a broader view that Adams intended to drive home after delivering the cigarettes merely shows an intention to complete his commute from the previous day which would still not place him in the course and scope of employment. In short, possession of Goodyear's tires with the intention of delivering them to Goodyear on another trip several hours after the accident does not confer course and scope under *Robertson.*

Another issue the majority raises which is immaterial, or, as stated by the dissent, "not probative" (*Mayes* at 59), is whether Goodyear restricted the use of the truck for personal reasons. The majority appears to have confused the concept of "permissive use" of a vehicle with "course and scope of employment." "[The] fact that (an employee) was driving a vehicle owned by his employer with the permission of the employer (does not) establish that he was acting in the course and scope of his employer's business." *Smith v. Garza, supra,* at 145. To hold otherwise would ignore the very essence of *Robertson*, which provides that all of its legal requirements must be proven in order for Adams to have been acting in the course and scope of his employment with Goodyear. Whether an employer restricts the use of its vehicle is not one of the *Robertson* factors for a finding of course and scope, and is irrelevant to the issue and to this case.

2. Lower Court Cited Cases Which Support Goodyear's Position

The majority below, in further failing to analyze the applicable legal requirements, cites several cases "inapposite to those cited by the dissenting opinion." *Mayes* at 56. However, had the majority reviewed the facts of those cases in light of the legal requirements of *Robertson* and analyzed the differences/similarities with this case, the majority would have concluded that those cases are too factually distinct from this case and thereby support, rather than refute, Goodyear's position.

One of these "inapposite" cases is *Gebert v. Clifton*, 553 S.W.2d 230 (Tex. Civ. App.--Houston [14th Dist.]1977, writ dism'd). In that case, Gebert's residence and normal place of work were in Alice, Texas. He was employed by Wilson to manage its office in Alice. Gebert's supervisor testified that he sent Gebert from the office in Alice

to the office in Odessa because the Odessa office manager had been fired, and it was necessary to have Gebert travel to Odessa immediately to take care of the Odessa office. He further testified that at the time and on the occasion in question, Gebert had full permission and authority to use the car owned by Wilson; Gebert was using the car in the furtherance of Wilson's business in Odessa; Wilson furnished office managers transportation only when on special assignment; Wilson pays the expenses of its employees that are out of town on business; and Wilson would have paid Gebert's taxi fare from his motel to the Odessa office had no company car been provided. Gebert testified that the vehicle was furnished him in furtherance of his job and business for Wilson, and just for the time that he stayed in Odessa. *Id* at 231.

The court concluded that Wilson failed to prove that Gebert was merely driving to work at the time of the accident. Gebert's home and office were in Alice, not Odessa. Gebert would not have been in Odessa but for the special circumstances brought about by the firing of the Odessa office manager. Gebert was in Odessa at the direction of his employer and in furtherance of the employer's business.

Unlike Gebert, Adams would have been in Houston regardless of whether he was to deliver tires to the Houston store. Further, whereas Gebert's manager testified that Gebert was in furtherance of Wilson's business at the time of the accident, Adams was clearly not in furtherance of Goodyear's business at 3:00 a.m. when he was going to a convenience store to buy cigarettes for his father.

Another "inapposite" case cited by the majority is *Chevron, U.S.A., Inc. v. Lee*, 847 S.W.2d 354 (Tex. App.—El Paso 1993, no writ). In *Chevron*, the record established

that Larry Hummel was regularly employed as an engine operator at Chevron's plant located in Crane County, Texas. As part of his employment, Hummel was required to attend a seminar on July 10, 1991 at Chevron's Midland Training Center, located approximately sixty miles from his residence in Monahans. On July 9, 1991, after completing his normal shift at the plant in Crane County, Hummel drove to Odessa, where he spent the night. Early the next morning Hummel left for the mandatory seminar, and while en route, was involved in an automobile accident with the Cunninghams. *Id* at 355.

At the time of the accident, Hummel had been ordered to attend the mandatory seminar in Midland, Texas on what otherwise would have been his day off from normal employment. Further, he was paid mileage for his travel to the seminar and his attendance at the seminar was for the ultimate benefit of his employer, Chevron, U.S.A.

The court found that, by his attendance at the seminar, Hummel was under the direction and control of Chevron while en route to Midland and that his mandatory attendance amounted to a "special mission." Moreover, the court noted that Hummel's attendance at the seminar was for the ultimate benefit of his employer, Chevron. Therefore, the court held that Hummel was in the course and scope. *Id* at 356.

Unlike Hummel, Adams' trip at 3:00 a.m. did not further Goodyear's business. Adams was not traveling to a specific location for any purpose at the request of his employer. Rather, Adams had been in his hometown for several hours and was en route to buy cigarettes for his father. Goodyear did not direct Adams's travel at 3:00 a.m. or that travel even be taken at that time of the morning. Further unlike Hummel, Adams

was free to enjoy his personal time while at home – a fact which is evident by Adams's decision to go get cigarettes at 3:00 a.m. Also, Adams' trip to the store in no way benefited Goodyear like Hummel's attendance at the seminar benefited Chevron.

The majority also relies on *Best Steel Bldgs., Inc. v. Hardin,* 533 S. W. 2d 122, 128 (Tex. Civ. App. —Tyler 1977, writ ref'd n.r.e.) as another example of an employee in the course and scope of employment who undertakes a task at his employer's direction or in furtherance of the employer's business. In that case, a supervisor sent two employees to travel from Austin to Houston to go to the employer's office to pick up some supplies and expense money. One of the employees testified that but for the instructions given by the supervisor to make the trip to pick up supplies, the trip would not have been made. The employees proceeded to the employer's place of business in Houston, but found no one there. They were then advised that it would not be necessary for them to pick up the supplies after all, and that they could drive back to Austin that night or wait until the next morning to make the trip. On the return trip to Austin the following morning, the accident occurred.

Based upon the foregoing facts, the court in *Best Steel Bldgs.* concluded that the trip to Houston was in furtherance of the employer's business, that the trip to Houston (and the subsequent return trip to Austin) was in the course and scope of the employee's employment, and that while performing this mission for the employer, the employee was subject to the right of control by his employer. The court further rejected the argument that, because the evidence established that his mission was completed the night before when the employee was advised that he did not need to pick up the supplies in Houston

after all, he was not in the course and scope of employment at the time of the collision while returning to Austin. In disagreeing with the employer's argument in this regard, the court stated that the evidence showed that at the time of the collision, the employee was traveling back to Austin on the most direct route between Austin and Houston. Most significantly, the court then stated that there "is nothing in the record to suggest that at the time of the collision (the employee) had undertaken a mission of his own." *Id.* at 129.

Unlike the facts of *Best Steel Bldgs.,* at the time of the collision in the instant case Adams had clearly "undertaken a mission of his own" in embarking on a trip from his father's house to a convenience store to purchase cigarettes for his father, thereafter intending to complete the round trip by returning to his father's home to deliver the cigarettes to him.

The majority opinion also refers to a line of cases advancing the proposition that the question of whether an employee is acting within the course and employment is generally a fact question for the jury, particularly when more than one inference may be drawn from the evidence or there is conflicting evidence as to the course and scope status. In the instant case, there is no conflict in the evidence, and there is no inference to be drawn from the evidence regarding Adam's mission at the time of the accident. He was purely, simply and undisputedly on a personal errand that was not within the general authority of his employment, nor was it in furtherance of Goodyear's business, nor was it taken for the accomplishment of the object for which Adams was hired by Goodyear.

Surely Adams could not have been in the course and scope of employment if the employee in *Direkly v. Ara Devcon*, 866 S.W.2d 652 (Tex. App.—Houston [1st Dist.]

1993, writ dism. w.o.j.) was not. In *Direkly*, the employee left her office and traveled to the residence of a friend to retrieve her briefcase, and was on her way home to complete some work for her employer when she was involved in a collision. The court granted her employer's motion for summary judgment, finding as a matter of law that she was not on a special mission for her employer, and was not in the course and scope of employment. Goodyear submits that the *Direkly* employee was much closer to the course and scope of employment than was Adams at the time of his accident.

b. Taken to Accomplish the Object for Which the Employee was Hired

The majority below also failed to analyze this requirement which must be satisfied in order for an employee to be in the course and scope of employment. Again, the dissenting opinion analyzes this legal requirement under the facts of the case and correctly concludes that Adams's actions were not taken to accomplish any object for which Adams was hired. "[T]he object for which Adams was hired was to change, fix, and sometimes deliver tires." *Mayes* at 59 (emphasis added). Adams was not hired "to drive to a convenience store to buy cigarettes for his father". *Id.* (emphasis added).

The facts of the instant case are virtually indistinguishable analytically from those of *Ginther v. Domino's Pizza, Inc.*, 93 S.W.3d 300 (Tex. App.—Houston [14th Dist.] 2002, pet. denied), cited in the dissent. In *Ginther*, the court held that the employee was not in course and scope based on the fact that "the object for which (he) was hired was to deliver pizza—not to drive around with his friends," which is what he was doing when his car stalled, causing an accident. *Id.* at 303−304. The object for which Adams was hired did not include driving to a convenience store to purchase cigarettes for his father.

The majority's silence on this, and all other, essential elements as put forth by this Court in *Robertson* is troubling and erroneous. The majority below has created bad law from its failure to apply the *Robertson* requirements, despite correctly stating them in citing *Wrenn* and *Soto*. Clearly, under those requirements, Adams was not in the course and scope of employment at the time of the accident.

In summary, the majority opinion places the emphasis in the wrong place in focusing on Adams' possession of Goodyear's property rather than on the purpose of his trip. Following this misplaced emphasis would produce an improper result at odds with Texas law. By way of example, if Adams had chosen to take his family on vacation in Goodyear's truck while in possession of Goodyear's tires and pager, the majority would find that a fact issue exists regarding whether Adams was in the course and scope of his employment. Goodyear respectfully contends that the key element per *Robertson, Wrenn* and *Soto* is the purpose of the trip, not the possession of the employer's property.

c. Workers' Compensation Payments Do Not Constitute Course and Scope

The majority below held that there was a "second, independent basis for our conclusion" that a fact issue exists regarding course and scope. *Mayes* at 57. It noted that Adams testified that Goodyear helped him complete forms to obtain workers' compensation payments. As noted above in the "Statement of Facts" section, there is no evidence in the record that anyone at Goodyear assisted Adams in completing any workers' compensation forms. Nevertheless, even if someone at Goodyear had done so, this would not have raised a fact issue regarding whether Adams was in the course and scope of his employment at the time of the accident.

Contrary to the majority's statement, there is no evidence to suggest that Goodyear authorized workers' compensation payments to Adams. The record does not identify the person or entity authorizing these payments. More often than not, it is not the employer's decision whether workers' compensation payments will be made to an employee. Rather, it is an insurance carrier that determines whether these benefits will be paid. In the absence of any evidence in the record that Goodyear played any role in this decision, no inference imputing this decision to Goodyear is proper.

Further, the reasoning by which an insurance carrier makes its determination may be multi-faceted and involve issues irrelevant to Goodyear. For example, workers' compensation claims are "first-party" claims with the attendant exposure for breaching the duty of good faith and fair dealing over and above the exposure of the value of the underlying claim. The carrier may determine that it is more prudent to pay on a less than meritorious underlying claim rather than face the additional exposure of the extra-contractual claim. Also, the carrier may not have had the benefit of, or decided not to engage in, a thorough investigation of the facts and circumstances surrounding the accident. The decision to pay Adams' workers' compensation claim simply cannot be imputed to Goodyear.

Even more significantly, Adams' receipt of workers' compensation payments is immaterial regarding whether he was acting in the course and scope of his employment as analyzed under the *Robertson* requirements. As Justice Jennings accurately observed in the dissent, "Adams' receipt of workers' compensation payments . . . is in no way probative on the issue of whether Adams' action, at the time of the collision, was (1) in

furtherance of Goodyear's business and (2) taken to accomplish the object for which Adams was hired . . . ." *Mayes* at 59.

2. Do the Facts Establish as a Matter of Law that Goodyear Tire & Rubber Company did not Negligently Entrust its Vehicle to Corte Adams?

In order to impose liability on Goodyear for negligent entrustment, Mayes must prove (1) entrustment of the truck by Goodyear, (2) to an unlicensed, incompetent or reckless driver, (3) that Goodyear knew or should have known to be unlicensed, incompetent or reckless, (4) that the driver was negligent on the occasion in question, and (5) that the driver's negligence proximately caused the accident. *Schneider v. Esperanza Transmission Co.*, 744 S.W.2d 595, 596 (Tex. 1987).

The most critical factors in the analysis of this case are factors 2 and 3 above; that is, whether Adams was an unlicensed, incompetent or reckless driver, and whether Goodyear knew or should have known this when Adams left the Bryan store in Goodyear's truck the day before the accident. The majority below failed to apply these factors to this case.

Adams possessed a valid driver's license at the time of the accident. The law provides that possession of a valid, unrestricted driver's license is evidence of a driver's competency absent any evidence to the contrary. *Avalos v. Brown Automotive Center, Inc*., 63 S.W.3d 42, 48 (Tex. App.—San Antonio 2001, no pet.). Therefore, there was a rebuttable presumption that Adams was a competent driver.

The majority misunderstood Goodyear's position regarding Adams' driving record, stating that "Goodyear appears to argue that Adams' driving record, as a matter of

law, proves that he was not a reckless driver." Goodyear wishes to clarify any confusion that it may have inadvertently created in the lower court.

Goodyear's position is that it was entitled to presume that Adams was a competent driver in accordance with *Avalos* since Adams possessed a valid driver's license. Once this presumption is raised, it was reasonable for Goodyear to entrust its vehicle to Adams absent evidence that he was incompetent. Goodyear's position regarding Adams' driving record is not that the record alone proves that Adams was not reckless. Rather, the license provides proof of his competence, and Goodyear had no evidence, including Adams' driving record, to overcome the presumption of competence. The key element is the license, not the driving record, which simply fails to overcome the presumption of competence that the license provides.

Rather than recognizing this legal provision and determining whether additional facts existed to rebut the presumption of competence, the majority focuses its analysis on the possibility that Adams may have been tired because he had worked 66.5 hours the week before the accident, despite acknowledging that this work week was "typical for Adams . . . ." *Mayes* at 53. There is absolutely no indication in the record that such a work load had ever rendered Adams unworthy of entrustment following completion of all previous average work weeks, nor is there any indication that he exhibited or expressed that he was tired or that anything was out of the ordinary when he left the Bryan store. Further, the majority failed to mention that it was not until 3:00 a.m. the following morning (after Adams traveled to the Houston store, went to his father's house, drank

some beers, ate some dinner, and slept for several hours) when he awoke and decided to go to a convenience store that the accident occurred.

It is understandable that anyone would be tired at 3:00 a.m. However, no one, including Goodyear, would have had reason to know the previous afternoon that Adams would attempt to drive to a convenience store in the wee hours of the following morning to buy cigarettes and fall asleep while doing so. The majority failed to apply the *Schneider* factors to these facts of the case. Rather, the majority essentially states that because Adams fell asleep while driving, regardless of when or why or any other factors surrounding his falling asleep, then Adams was incompetent or reckless and that Goodyear, or any person/entity that entrusts someone with a vehicle some eight hours earlier at a time when the entrustee is perfectly competent to drive, knew or should have known that such an accident was likely to occur many hours later.

This is a gross failure to analyze and apply the *Schneider* factors to this case; it assumes that if an accident occurs due to the entrustee's fault, then the entrustor is liable. This approach is not supported in Texas jurisprudence. Instead, the majority should have analyzed whether, <u>at the time Adams was entrusted with the truck</u>, Goodyear knew or should have known that Adams was incompetent or reckless; the inquiry is <u>not</u> whether Adams may have been incompetent or reckless <u>at the time of the accident</u>. The majority thus failed to apply the test of *Louis Thames Chevrolet Co. v. Hathaway*, 712 S.W.2d 602, 604 (Tex. App.—Houston [1st Dist.] 1986, no writ), despite citing it for the well-reasoned tenet that the condition of the entrustee at the time of the entrustment may be the most important factor in determining whether an entrustment is negligent. *Mayes* at

57. In failing to apply *Hathaway*, the majority eliminated the "negligent" aspect of negligent entrustment, instead transforming this doctrine into virtual strict liability based on hindsight.

There is no evidence suggesting that Adams was an incompetent or reckless driver when he left the Bryan store the day before the accident. Nothing in Adams' driving record prior to the accident even suggested that Adams may have been incompetent or reckless. No reasonable person would have thought otherwise. According to *Schneider* and *Hathaway*, Adams was not incompetent or reckless when entrusted with the truck the day before the accident, and there is certainly no evidence in the record that Goodyear knew or should have known that he was.

CONCLUSION

The dissent correctly analyzed both of the issues in this case, and correctly applied the controlling case law. In discussing the course and scope of employment issue, Justice Jennings stated "The undisputed and controlling fact remains that Adams' 3:00 a.m. trip from his father's house, after having had dinner, 'a few beers,' and several hours of sleep, to the convenience store to buy cigarettes for his father was strictly personal." *Mayes* at 60. Based on the foregoing, he determined that Adams was outside the course and scope of employment with Goodyear as a matter of law.

In analyzing whether Goodyear negligently entrusted its truck to Adams at 5:33 p.m. on the day before the accident, Justice Jennings made the following observation:

> It does not logically follow that because Adams had a long workweek and commute time that Goodyear knew or should have known that Adams would wake up at 3:00 a.m. and attempt to drive Goodyear's

> truck on a personal errand while he was still tired. Because the evidence, favorable to Mayes, does not support a reasonable inference that Goodyear knew or should have known that Adams was likely to commit such an act, I would hold, as a matter of law, that his alleged negligence cannot be attributed to Goodyear under the theory of negligent entrustment. *Id.* at 60.

The facts of this case are neither in dispute nor ambiguous. There are no inferences to be drawn regarding whether Adams was in the course and scope of his employment or whether Goodyear negligently entrusted its vehicle to him.

Summary judgments are valid tools in Texas for "eliminating patently unmeritorious claims . . . ." *Huckabee v. Time Warner Entertainment Co.*, 19 S.W.3d 413, 421 (Tex. 2000). Mayes presents just such a claim. It should be eliminated.

PRAYER

For the reasons stated in this brief, Goodyear asks the Court to set this case for oral argument, and, after argument, sustain Goodyear's issues presented for review, reverse the judgment of the court of appeals and affirm the summary judgment in favor of Goodyear granted by the trial court.

Respectfully submitted,

Robert C. Scruggs
Texas Bar No. 17933500
KING, LeBLANC & BLAND, P.L.L.C.
7500 San Felipe, Suite 800
Houston, Texas 77063
Tel. (713) 334-5644
Fax (713) 334-5828

ATTORNEYS FOR PETITIONER, GOODYEAR TIRE AND RUBBER COMPANY

CERTIFICATE OF SERVICE

Petitioner hereby certifies that a true and correct copy of the foregoing Petitioner's Brief has been served upon the following counsel of record for Respondent by certified mail, return receipt requested, on the 8th day of July, 2005.

Valorie W. Davenport — Certified/RRR 7001 2510 0002 2898 1758
Denise W. Novotny
Davenport Legal Group
440 Louisiana, Suite 1210
Houston, Texas 77002
ATTORNEYS FOR RESPONDENT
PATRICK MAYES

_____

Robert C. Scruggs