AFFIRM; and Opinion Filed May 29, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01011-CV

CHOCTAW NATION OF OKLAHOMA, Appellant
V.
LINDA SEWELL, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF ALICE WILKINSON STANLEY, RONALD STANLEY, WILLIAM STANLEY, MELISSA ENGLMAN, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF PAULA HAHN, KENNETH HILDRETH, DONNA GARNER AND KATHY BOLTON, Appellees

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On Appeal from the 193rd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-13-04381

MEMORANDUM OPINION

Before Justices Lang-Miers, Myers, and Boatright
Opinion by Justice Boatright

A bus owned by Cardinal Coach Line, Inc. and chartered by appellant, Choctaw Nation of Oklahoma, crashed while en route to Choctaw's casino in Durant, Oklahoma. The families of two bus passengers who died in the accident asserted wrongful death and survival claims against Choctaw. The primary issue in this appeal is whether the evidence supports the jury's findings that Choctaw was vicariously liable for the negligence of (i) the individual who organized the trip, and (ii) Cardinal and its contract bus driver. We affirm.

BACKGROUND

Choctaw provides motor coach transportation to its Durant casino for groups of thirty or more customers who are members of its "Player's Club" and who commit to stay at the casino for

at least five hours on a given trip. To utilize Choctaw's bus service, a "group tour coordinator" must make a reservation through Choctaw's Tours and Travel Department. Group tour coordinators are not employees of Choctaw, but they must sign a "Group Tour Acceptance Agreement" that sets forth Choctaw's rules for the buses that it provides. The rules bar unsafe or inappropriate passenger conduct, including a prohibition against distracting the bus driver while he is driving.

Choctaw is federally licensed as a motor carrier. It owns and operates a fleet of buses to transport its customers to and from its casino. It also charters authorized carriers to handle trips for which its own buses are not available. The casino trip at issue was such an occasion. Sue Taylor, a group tour coordinator known to her friends as "Casino Sue," made reservations with Choctaw for a trip to occur on April 11, 2013. To accommodate Taylor's reservation, Choctaw contracted with Cardinal, an independent charter bus company that itself was a federally licensed motor carrier and that owned its own fleet of buses. Cardinal charged Choctaw $750 for the round trip and assigned one of its contract bus drivers, Loyd Rieve, to serve as the driver. Cardinal paid Rieve $125 to make the trip. Rieve had driven on prior casino trips organized by Taylor, and Taylor requested that he be assigned to drive on the trip in question.

On the morning of April 11, the Cardinal-owned bus picked up Taylor's group, the majority of whom were senior citizens, and embarked for the casino. The accident occurred soon after the bus had merged onto the President George Bush Turnpike from State Highway 161. Rieve and Taylor disagreed over whether to continue on the turnpike, which is a paid tollway. Rieve crashed the bus while discussing this issue with Taylor. The bus drifted onto the shoulder, struck a crash attenuator, and then veered across the road and struck a concrete barrier, after which it rolled onto its side. The Department of Public Safety subsequently concluded that the accident was caused by Rieve's failure to drive in a single lane of traffic due to driver inattention or a medical issue.

Passengers Alice Stanley and Paula Hahn died in the accident. Thereafter, appellee Linda Sewell, individually and on behalf of Ms. Stanley's estate, and appellees Ronald and William Stanley, who are Ms. Stanley's surviving sons, sued Cardinal and Rieve based on claims including negligence and vicarious liability. The Stanley appellees later amended their petition to add Choctaw as a defendant and to assert similar claims against it. In addition, appellee Melissa Engman, individually and on behalf of Ms. Hahn's estate, and appellees Kenneth Hindreth, Donna Garner, and Kathy Bolton, who are Hahn's surviving children, intervened in the lawsuit and asserted similar claims against Choctaw. The appellees settled with Cardinal and Rieve, and their claims against Choctaw were tried in April 2016.

At the conclusion of the trial, the jury found that the negligence of Choctaw, Rieve, and Cardinal proximately caused the accident. The jury apportioned Choctaw's responsibility at twenty-five percent, Rieve's at fifty-eight percent, and Cardinal's at seventeen percent. The jury also found against Choctaw on several common-law vicarious liability theories, as will be described in more detail below. The district court rendered judgment against Choctaw in an amount in excess of $9.3 million, which represented 100 percent of the damages found by the jury, less certain settlement credits. Choctaw filed a motion for new trial, which was overruled by operation of law. This appeal followed.

ANALYSIS

Choctaw raises fifteen issues. Ten of these relate to whether Choctaw owed the appellees a duty, which is predicated on whether it can be held vicariously liable for the negligence of Taylor, Cardinal, and Rieve.

I. Federal Preemption

In its first through third issues, Choctaw contends that Cardinal was the sole federal motor carrier with respect to the trip in question. *See Gonzalez v. Ramirez*, 463 S.W.3d 499, 504 (Tex.

2015) (per curiam) (concluding that a defendant's status as a motor carrier depends on the specific transaction at issue). It argues that Cardinal, as the sole carrier, owed a non-delegable duty to the bus passengers and was exclusively liable for Rieve's negligence. *See Morris v JTM Materials, Inc.*, 78 S.W.3d 28, 40 (Tex. App.—Fort Worth 2002, no pet.) (concluding that a licensed motor carrier may not release itself from liability by delegating the rights conferred by its license to another party). Choctaw also urges that federal law preempts the appellees' state law claims against it.

We need not decide whether Cardinal was the sole federal carrier here.[1] Even assuming this to be the case, federal preemption would not bar the appellees' state-law claims against Choctaw. While preemption may preclude a motor carrier from avoiding liability by classifying its drivers as independent contractors, *Morris*, 78 S.W.3d at 37–39, it does not preclude an injured plaintiff from imposing liability on other parties based upon state-law principles of vicarious liability. For example, an interstate motor carrier's liability for equipment and drivers covered by leasing arrangements is not governed by common-law doctrines. *Id.* at 39. Instead, the carrier (also referred to as the statutory employer) is vicariously liable as a matter of law under federal law for the negligence of its statutory employee drivers. *Id.* However, the carrier's liability under federal law does not preempt the imposition of state common-law liability against other parties. *See Hogan v. J. Higgins Trucking, Inc.*, 197 S.W.3d 879, 884 (Tex. App.—Dallas 2006, no pet.) (noting that federal case law has not interpreted 49 C.F.R. § 376.12(c) to preempt common-law liability). In sum, the federal statutory liability of a carrier (in this case, Cardinal) is in addition to, not in lieu of, the common-law liability of other parties to the incident (in this case, Choctaw). We overrule Choctaw's first through third issues.

[1] The appellees urge to the contrary—that Choctaw and Cardinal were both liable as "co-carriers" under federal law. Though Choctaw concedes that it too is a federally licensed motor carrier, no such evidence was presented to the jury, nor was this issue submitted in the court's charge.

II. State-Law Vicarious Liability

Choctaw's fourth through tenth issues contest the jury's findings that it was liable for the negligence of Taylor, Rieve, and Cardinal under state-law control theories. The jury found that "during the occurrence in question":

(i). Choctaw "exercise[d] or retain[ed] some control over the manner by which the passengers were transported by bus to the casino" (Question One);

(ii). Cardinal, Rieve, and Taylor were "acting in the furtherance of a mission for the benefit of Choctaw and subject to control by Choctaw as to the details of the mission" (Question Two);

(iii). Rieve was a "borrowed employee" of Choctaw (Question Three); and

(iv). An "ostensible agency" relationship existed between Choctaw and Taylor "with respect to the transportation of the passengers to the casino." (Question Four).

Choctaw contends that the evidence does not support the jury's findings, alleging that (i) the operation of the bus was under Cardinal's exclusive control, (ii) Rieve was not a "borrowed employee," (iii) Taylor was neither Choctaw's agent nor its ostensible agent, and (iv) Taylor did not interfere with Rieve's driving of the bus.

A. Sufficiency of Evidence to Support Findings Regarding Taylor

The appellees' case against Choctaw focused in large part on Taylor's role in causing the accident. We thus begin by examining Choctaw's contention that it is not liable for Taylor's conduct.

1. Existence of a Duty

The jury found Choctaw responsible for twenty-five percent of the appellees' loss. Choctaw interprets this finding as factually predicated on Taylor's distraction of Rieve as he drove the bus. Its eighth issue contends that it was Rieve who chose to converse with Taylor as he drove the bus and that Taylor's conduct did not give rise to a duty on her part to the other passengers. Choctaw relies on out-of-state case law that, in the absence of a special relationship causing the

negligence of the driver to be imputed to the passenger, the passenger owes no duty to a third party to exercise any control or to give any warning to the driver. *E.g., Hurt v. Freeland*, 589 N.W.2d 551, 553, 555–59 (N.D. 1999); *Welc v. Porter*, 675 A.2d 334, 338 (Pa. Super. Ct. 1996); *Brown v. Jones*, 503 N.W.2d 735, 736 (Mich. Ct. App. 1993); *Lego v. Schmidt*, 805 P.2d 1119, 1122–23 (Colo. Ct. App. 1990). However, the cases cited by Choctaw also acknowledge a passenger's duty not to substantially interfere with the driver's operation of the vehicle. *See Hurt*, 589 N.W.2d at 558 ("Liability may attach where the passenger has substantially interfered with the operation of the vehicle, because a passenger has a duty not to interfere with the operation of the vehicle."); *Lego*, 805 P.2d at 1122 (noting out-of-state case law permitting recovery against passenger who, by hitting driver on head, caused him to turn around and lose control of vehicle (citing *Hetterle v. Chido*, 400 N.W.2d 324 (Mich. Ct. App. 1986)))); *Resseguie v. Reynolds*, 11 Pa. D. & C.4th 558, 562 (Pa. Ct. of Common Pleas 1991), *aff'd*, 613 A.2d 34 (Pa. Super. Ct. 1992) (noting that no Pennsylvania court has recognized a passenger duty but that "one such duty probably includes the duty not to actively interfere with the driver, by blinding his vision, or affecting the steering, or throwing matter into his lap or upon his feet").

In Texas, the existence of a duty is a question of law for the court to decide from the facts surrounding the circumstances in question. *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990). A passenger's duty is measured by the same standard of care as that of the driver, though the conduct required of a passenger to satisfy her duty may be different from that required of the driver. *Adams v. Morris*, 584 S.W.2d 712, 716 (Tex. Civ. App.—Tyler 1979, no writ). A passenger may rely on the driver to keep watch unless she knows from past experience, or from the manner in which the vehicle is being driven on the particular trip, that the driver is likely to be inattentive or careless. *Id.* In addition, a passenger must protest the driver's excessive speed if it is such that a reasonable man would realize its excessive character. *Id.*

Our sister court in *Adams* affirmed the trial court's conclusion that the passenger owed a duty, based on circumstances including that the passenger (i) retained the authority to direct how the car was operated, (ii) diverted the driver's attention by requesting the driver to clean up the seat while the passenger attempted to stand up in the car, and (iii) failed to keep a lookout while the driver's attention was diverted and failed to request the driver to slow down or stop. *Id.* at 716–17. In contrast, another sister court in *Galvan v. Sisk* affirmed a summary judgment for the defendant passenger based on evidence including that the driver was not speeding, the passenger had seen nothing about the driver's driving that would alarm him, and the passenger was not advising or directing the driver in any way. 526 S.W.2d 717, 719–20 (Tex. Civ. App.—San Antonio 1975, no writ). The court also affirmed the passenger's summary-judgment motion against the plaintiff's joint venture and master-and-servant theories of liability, determining that these theories were negated by the absence of evidence that the driver had relinquished any part of his exclusive right to control the automobile. *Id.* at 719. In *Escamilla v. Garcia*, the San Antonio Court of Appeals affirmed a jury's verdict that a passenger had acted with comparative negligence by interfering with the driver's operation of the vehicle. 653 S.W.2d 58, 59–62 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.). The court rejected the passenger's contention that the evidence was insufficient to support the verdict, noting that the driver had testified that the passenger yelled and grabbed at the driver, or at the steering wheel, so as to distract the driver and prevent him from avoiding the accident. *Id.*

Based upon the foregoing authority from this state and from other jurisdictions, we conclude that Taylor owed a duty to her fellow passengers to refrain from affirmatively interfering with Rieve's operation of the bus, which is the appellees' theory of the case. We overrule Choctaw's eighth issue.

2. Breach of Duty

Choctaw's ninth issue urges that the evidence was insufficient to show that Taylor affirmatively distracted Rieve, as opposed to Rieve's becoming distracted independently. We construe Choctaw's brief as contesting the legal sufficiency of the evidence to support the jury's findings.[2] We must credit favorable evidence that supports the verdict, if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). Anything more than a scintilla of evidence is legally sufficient to support a jury's finding. *Cont'l Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444, 450 (Tex. 1996). To be more than a scintilla, the evidence must "rise[] to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Gharda USA, Inc. v. Control Sols., Inc.*, 464 S.W.3d 338, 347 (Tex. 2015) (citation and internal quotation omitted).

We next examine the evidence, viewed in the light most favorable to the jury's findings, relevant to whether Taylor affirmatively interfered with Rieve's operation of the bus. Taylor did not testify at trial, and Rieve had no recollection of the accident. However, passenger Martha Boultinghouse offered an eyewitness view observed from her aisle seat located six or seven rows back on the passenger side of the bus. According to Boultinghouse, Taylor walked up and stood in the aisle directly behind Rieve, next to her driver-side front-row seat. Boultinghouse saw Taylor engage Rieve in conversation. Rieve said that he needed a toll sticker to take the turnpike, and Taylor responded that she did not have a sticker. Rieve appeared distracted as he divided his attention between driving and conversing with Taylor. Boultinghouse perceived that Rieve was driving too fast.

[2] While the "issues presented" section of Choctaw's brief also poses whether there is a factual basis for some findings, and whether the evidence is factually sufficient to support other findings, the body of the brief neither references nor analyzes a factual-sufficiency challenge. We therefore conclude that Choctaw inadequately briefed its factual sufficiency challenge, and we will not address it. *See* TEX. R. APP. P. 38.1(i) (providing that appellant's brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record).

Passenger Dorothy Kramer relayed her observations made from her third-row aisle seat on the passenger side. Taylor walked down the aisle toward the back of the bus and then returned to sit in her seat, directly behind Rieve, with her legs in the aisle. Kramer saw Rieve holding something in his hand and talking about toll fees, which led her to believe that he was on his cell phone with Cardinal to seek permission to take the turnpike. Rieve continued to talk with the other party at the same time that he looked over his shoulder and spoke with Taylor. He said that Cardinal had spent over $700 in toll fees and that he did not have permission to take the turnpike without a toll sticker. As the conversation continued, Taylor offered to pay the toll herself. The conversation was "a little heated," and both Taylor and Rieve appeared irritated. Kramer had difficulty estimating how much time elapsed between the conversation and the accident, nor could she say whether Taylor was sitting or standing at the moment of impact.

Upon viewing the evidence in the light most favorable to the verdict, we conclude that more than a scintilla supports a finding that Taylor actively participated in Rieve's negligence by affirmatively distracting him, thereby causing him to crash the bus. *See Travis v. City of Mesquite*, 830 S.W.3d 94, 98 (Tex. 1992) (noting that there can be concurrent proximate causes of an accident). The jury reasonably could infer that Rieve did not intend to continue on the turnpike but that Taylor stood directly behind him and argued the point, thereby distracting him. Boultinghouse and Kramer confirmed that Rieve appeared irritated and distracted, and Officer Heath Armstrong, who investigated the accident, opined that Taylor's conversation was a factor in causing the accident. This evidence is legally sufficient to support a finding that Taylor affirmatively interfered with Rieve's driving of the bus. We overrule Choctaw's ninth issue.

3. Actual Agency

We now turn to Choctaw's contention that, even if Taylor were negligent, there is no evidence to support the jury's findings that imputed such negligence to Choctaw. We begin by

considering the finding that Taylor acted on a mission for Choctaw's benefit and subject to its control. This finding was based on the doctrine of "nonemployee mission liability," a form of respondeat superior liability outside of the employment context. *Arvizu v. Estate of Puckett*, 364 S.W.3d 273, 275 n.3 (Tex. 2012) (per curiam). Choctaw has not challenged this finding, though it challenges the jury's separate finding that Taylor was its ostensible agent. We conclude that Choctaw waived any challenge to the nonemployee mission liability finding, TEX. R. APP. P. 38.1(i), and in any event, the evidence was legally sufficient to support the finding.

With respect to the first element of this theory, a mission for Choctaw's benefit, the evidence demonstrates that Choctaw expected to profit up to $15,000 from a group trip such as Taylor's. The evidence also supports the second element—that Taylor was subject to Choctaw's control. Nona Clutts—Choctaw's Tours and Travel Manager, who was responsible for supervising its group tour coordinators and for enforcing its rules—testified that Taylor was expected to enforce Choctaw's rules and to communicate them to Rieve so that he could enforce them in the event that Taylor was unable to do so.[3] The rules were contained in a Group Tour Acceptance Agreement (GTAA), which Taylor signed. One of the purposes of the GTAA was "to provide the safest . . . transportation for [Choctaw's] passengers." Among other rules, the GTAA provided that (i) "[e]ach passenger must be in a seat," (ii) "[p]assengers should not be up in motion while the bus is in motion," and (iii) "[p]assengers should not distract the driver while driving." Clutts was responsible for implementing corrective actions and had the authority to terminate Taylor should she fail to enforce the GTAA. The foregoing evidence is more than a scintilla that supports the jury's finding that Taylor acted for Choctaw's benefit and subject to its control.

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[3] Cardinal's owner, Matt Biran, also acknowledged that Rieve was permitted to enforce Choctaw's rules in addition to Cardinal's, and Rieve testified that he would have obeyed a directive from Taylor, such as to slow down while driving the bus, so long as it did not compromise passenger safety. The rules themselves authorized Rieve to refuse to operate the bus in any way that he felt would compromise passenger safety.

Choctaw contends that the GTAA did not apply to a chartered bus or to the specific trip at issue. We disagree. The agreement's reference to the "use of a Choctaw Casino Resort bus" must be considered in the context of the reference that "Choctaw . . . cannot guarantee any specific bus company or driver for your trip." Clutts also agreed that Choctaw would enforce its rules on "whatever kind of bus it is," which undermines Choctaw's contention that the GTAA applied only to a Choctaw-owned bus. In addition, while the agreement signed by Taylor was dated January 2012, over a year prior to the trip in question, it also references both a "first" and "future" trips, thereby implying that a single agreement was intended to cover more than one trip. Consistent with this interpretation, Choctaw's internal policies required its sales agents to verify that "the [GTAA] is current and saved at the designated location." In short, Choctaw's contentions regarding the GTAA do not change our view that the evidence supports the jury's finding that Taylor acted as Choctaw's nonemployee agent.

4. Ostensible Agency

Notwithstanding our conclusion that the evidence supports the jury's agency finding as to Taylor, we alternatively consider Choctaw's tenth issue, which challenges the sufficiency of the evidence to support the jury's finding that Taylor was Choctaw's ostensible agent. As noted in the court's charge, an ostensible agency relationship is based on estoppel and requires the appellees to show that (i) the deceased passenger plaintiffs, Stanley and Hahn, reasonably believed that Taylor was Choctaw's agent or employee, (ii) this belief was generated by Choctaw's affirmatively holding out Taylor as its agent or employee, or by Choctaw's knowingly permitting Taylor to hold herself out as such, and (iii) Stanley and Hahn justifiably relied on the representation of authority. *Baptist Mem'l Hosp. Sys. v. Simpson*, 969 S.W.2d 945, 949 (Tex. 1998). In the context of "apparent authority," a term synonymous with "ostensible agency," *id.* at 947–48 n.2, such a relationship may arise if Choctaw knowingly permitted Taylor to hold herself out as having authority, or if its

actions lacked such ordinary care as to clothe Taylor with the indicia of authority. *Id*. at 949. Moreover, although Stanley and Hahn were unavailable to testify, the jury was properly instructed that a fact could be established by circumstantial evidence.

With these standards in mind, we begin by examining whether Choctaw engaged in conduct that would lead a reasonable passenger to believe that Taylor had actual authority. *See NationsBank, N.A. v. Dilling*, 922 S.W.2d 950, 953 (Tex. 1996) (per curiam) ("A court may consider only the conduct of the principal leading a third party to believe that the agent has authority in determining whether an agent has apparent authority."). Choctaw delegated several responsibilities to Taylor under the GTAA that conveyed the appearance of actual authority. As described previously, the GTAA required Taylor to enforce Choctaw's rules, and Boultinghouse recalled Taylor enforcing one such rule, the prohibition against alcohol on the bus. The GTAA also required that each group member obtain a Player's Club membership, and Clutts agreed that Taylor was responsible for enforcing this requirement with respect to her group members. Boultinghouse also remembered Taylor reminding her fellow passengers to check their Player's Club cards, among the other announcements that Taylor made over the bus microphone.

Based on the foregoing evidence, we conclude that that the jury could have determined that Choctaw's delegation of responsibilities to Taylor under the GTAA created an outward appearance that led Stanley and Hahn to reasonably believe that Taylor was acting on Choctaw's behalf. Nothing in the record suggests that Choctaw discouraged this outward appearance. *See Walker Ins. Servs. v. Bottle Rock Power Corp.*, 108 S.W.3d 538, 551 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (noting importance of lack of disclaimer by principal); *cf. Humble Nat'l Bank v. DCV, Inc.*, 933 S.W.2d 224, 238 (Tex. App.—Houston [14th Dist.] 1996, writ denied) ("Apparent authority is not available where the other contracting party has notice of the limitations of the agent's power."). While Choctaw contends that Taylor acted on behalf of her own group, not

Choctaw, the foregoing evidence constitutes more than a scintilla that a reasonable passenger, including plaintiffs Stanley and Hahn, could believe to the contrary. In short, the evidence is legally sufficient to support the jury's ostensible agency finding. We overrule Choctaw's tenth issue.

B. Sufficiency of Evidence to Support Findings Regarding Cardinal and Rieve

As described previously, the jury found Cardinal and Rieve liable for negligence and held them responsible for seventy-five percent of the appellees' loss. Choctaw's fourth through seventh issues challenge the jury's additional findings that imputed Cardinal's and Rieve's negligence to Choctaw. Such findings are predicated on whether Choctaw retained some control over the manner in which Cardinal and Rieve performed the work that caused the plaintiffs' injuries—i.e., their operation of the bus. *Gonzalez*, 463 S.W.3d at 506.

In Choctaw's view, Cardinal retained exclusive control over the operation of its bus. Choctaw analogizes to *Gonzalez*, in which the Texas Supreme Court held that a plaintiff had offered no evidence that the defendant general contractor met the Texas-law definition of a "motor carrier"—one who "'controls, operates, or directs the operation of one or more vehicles that transport persons or cargo.'" 463 S.W.3d at 501, 503–06 (quoting TEX. TRANSP. CODE § 643.001(6)). Specifically, the plaintiff presented no evidence that the general contractor exercised any control over the subcontractor's trucks or drivers as they transported the cargo to its destination, nor did the general contractor select the particular trucks used. *Id.* at 506. Rather, the circumstances demonstrated that the general contractor merely told the subcontractor where to pick up and deliver the cargo, and also loaded the trucks, which the court held was the role of a shipper, not a motor carrier. *Id.* at 505–06. The court similarly concluded that the general contractor owed no common-law duty to the subcontractor's truck driver, given the absence of any evidence that the general contractor exercised control over the manner in which the subcontractor performed its work. *Id.* at 506–08. In this regard, the court observed that "the 'possibility of control

is not evidence of a right to control actually retained or exercised.'" *Id.* at 506–07 (quoting *Coastal Marine Serv. of Tex., Inc. v. Lawrence*, 988 S.W.2d 223, 226 (Tex.1999) (internal quotation marks omitted)).

Choctaw urges that, as in *Gonzalez*, there is no evidence that it controlled Cardinal or Rieve. It notes that Cardinal alone selected the bus and the driver (in this case, Rieve) and retained the exclusive right and responsibility to hire, fire, and train the driver. It also refers to Rieve's testimony that he (i) controlled the speed of the bus, (ii) chose the route to be taken, and (iii) was responsible for passenger safety, including paying attention to the roadway while driving the bus. Moreover, it points to Rieve's denial that he was authorized to act on Choctaw's behalf, as evidenced by the fact that he had neither seen nor heard of the GTAA prior to the accident.

The appellees respond that "determining whether someone exercised actual control is generally a question of fact for the jury," *Lee Lewis Const., Inc. v. Harrison*, 70 S.W.3d 778, 783 (Tex. 2001), and that the evidence supports the jury's findings. Under the appellees' theory of the case, Choctaw controlled Rieve through Taylor's "on-site orders" on the bus and through her oversight and approval of Rieve's non-compliance with Choctaw's rules that prohibited distracting the bus driver.

Upon examining the record in the light most favorable to the verdict, we conclude that the evidence is legally sufficient to show that Taylor, as Choctaw's agent, exercised actual control over Cardinal and Rieve through her instructions to Rieve as he drove Cardinal's bus. *Cf. Hoechst-Celanese Corp. v. Mendez*, 967 S.W.2d 354, 357 (Tex. 1998) (per curiam) ("[A]n employer who gives on-site orders . . . on the means or methods to carry out a work order owes the independent contractor employee a duty of reasonable care to protect him from work-related hazards."). More than a scintilla of evidence suggests that Rieve had not planned to take the turnpike, and he did not have permission from Cardinal to do so, but that Taylor ordered him to quickly change his route

onto the turnpike. There is also evidence that Taylor's order under the circumstances violated Choctaw's safety rules and distracted Rieve to the point that he was unable to control the bus. As explained previously, Boultinghouse testified that Taylor walked up and stood directly behind Rieve, in violation of Choctaw's requirement that each passenger "must be in a seat" and "should not be up in motion while the bus is in motion." Kramer testified that Rieve, Taylor, and Cardinal engaged in a three-way conversation, with Rieve turning to address Taylor, in violation of Choctaw's requirement that "[p]assengers should not distract the driver while driving." When Rieve was unable to obtain Cardinal's permission, Taylor apparently refused to concede the point and instead offered to pay the toll herself.

We further conclude that legally sufficient evidence supports a jury determination that Taylor exercised supervisory control over Rieve's operation of the bus. *Cf. Dow Chem. Co. v. Bright*, 89 S.W.3d 602, 609 (Tex. 2002) ("This Court has recognized that a general contractor has actually exercised control of a premises when the general contractor knew of a dangerous condition before an injury occurred and approved acts that were dangerous and unsafe."). By her signature, Taylor acknowledged that she had reviewed and agreed with the GTAA's terms, including its passenger-conduct safety rules. From this evidence, a reasonable juror could infer that Taylor knew of the danger to her fellow passengers if Choctaw's safety rules were not followed. However, despite such knowledge, the foregoing evidence suggests that Taylor specifically approved of Rieve's operation of the bus in an unsafe manner. Such evidence is legally sufficient to support the jury's finding that Choctaw exercised control over Cardinal and Rieve.

Choctaw relies on *Elvir v. Brazos Paving, Inc.*, in which our sister court affirmed a take-nothing summary judgment based on the plaintiff's failure to offer evidence of control as necessary to establish its vicarious liability claims. No. 13-16-00546-CV, 2017 WL 3769015, at *2–5 (Tex. App.—Corpus Christi Aug. 31, 2017, no pet.) (mem. op.). The defendant in *Elvir* was a

subcontractor two tiers removed from the driver whose purported negligence caused the accident in question. *Id.* at *2–3. The plaintiff offered evidence that (i) the defendant's subcontractor provided other drivers because it had only one available truck, (ii) the work ticket for the job on which the accident occurred referenced the defendant's initials in the "name" section, (iii) the defendant's vice president conceded that before the accident someone knew that the twice-removed subcontractor was driving a truck to do a job for the defendant, and (iv) the vice president also conceded that the truck was on the road for the defendant's "benefit." *Id.* at *3, *5. The court concluded that this evidence failed to show "control" that was "'so persistent,'" and "'acquiescence'" by the contractor that was "'so pronounced as to raise an inference that at the time of the act or omission giving rise to liability, the parties by implied consent and acquiescence had agreed that the principal might have the right to control the details of the work.'" *Id.* at *5 (quoting *Newspapers, Inc. v. Love*, 380 S.W.2d 582, 592 (Tex. 1964)). Unlike *Elvir*, the case before us contains more than a scintilla of evidence that Choctaw's agent (Taylor) exercised actual control over Rieve's operation of Cardinal's bus and that Rieve acquiesced in Taylor's exercise of control. We thus conclude that *Elvir* is distinguishable from the facts of this case.

We overrule Choctaw's fourth through seventh issues.

III. Jury Charge

Choctaw's eleventh issue urges that the district court erred in refusing to define the phrase "occurrence in question" in the charge. This phrase was used in each of the questions that the court submitted in its charge. At the charge conference, Choctaw's counsel objected to the lack of a definition for the phrase and requested that the court define the "occurrence in question" as the "bus crash which is alleged to have occurred on or about April 11, 2013, on the George Bush Turnpike in Dallas County, Texas." The court overruled the objection and denied the requested instruction.

During its deliberations, the jury sent a note to the court that inquired how the word "occurrence" should be "interpreted or defined." The jury's note proposed three alternatives: (i) "just the crash," or (ii) "[a]ll happenings leading up to and including the crash," or (iii) "[j]ust the events of the day." Choctaw's counsel renewed its request that the court define "occurrence in question" as the April 11 bus accident. The court instead sent a note to the jury that stated, "since the term 'occurrence' is not specifically defined, you are to use the 'ordinary meaning' of the term . . . which you should determine using your collective understanding considering the totality of the circumstances and evidence that you have heard." The jury did not request further clarification.

This Court has defined "occurrence in question" as the "legal basis of the lawsuit." *Upjohn Co. v. Freeman*, 885 S.W.2d 538, 546 (Tex. App.—Dallas 1994, writ denied). Choctaw contends that the bus accident was the sole basis of this lawsuit and that the court's charge and its subsequent instruction were overly broad by failing to so inform the jury. A trial court has "considerable discretion in deciding what instructions are necessary and proper in submitting issues to the jury." *State Farm Lloyds v. Nicolau*, 951 S.W.2d 444, 451–52 (Tex. 1997) (citing, inter alia, TEX. R. CIV. P. 277). The court is required to define "only those words or phrases given a peculiar and distinctive meaning by law." *Allied Gen. Agency, Inc. v. Moody*, 788 S.W.2d 601, 607 (Tex. App.—Dallas 1990, writ denied). "Words that have no special legal or technical meaning apart from their ordinary usage need not be defined." *Id.*

Choctaw does not contend that the phrase "occurrence in question" had a peculiar meaning that required a definition apart from its ordinary usage. This phrase has been used in other cases without an accompanying definition and is also included in the Texas pattern jury charge. *See, e.g., Bed, Bath & Beyond, Inc. v. Urista*, 211 S.W.3d 753, 755 (Tex. 2006) (noting liability question in broad-form charge that asked whether defendant's negligence "proximately caused the occurrence in question"); Conn. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges:*

General Negligence, Intentional Torts, and Worker's Compensation PJC 4.1 (2016) (including "[*injury*] [*occurrence*] in question" in broad-form submission on negligence claims). In addition, the definition proposed by Choctaw would have unduly restricted the jury's application of the phrase "occurrence in question" in the context of the charge's vicarious liability questions. These questions asked whether, "during the occurrence in question," Choctaw exercised the requisite control over Taylor, Cardinal, and Rieve, and whether there was an "ostensible agency" or "borrowed employee" relationship. Had the trial court included the "occurrence" definition requested by Choctaw, which was limited to the crash itself, this definition effectively would have precluded the jury from considering Taylor's conduct in the moments that preceded the crash. We conclude that the trial court did not err in declining to include such a definition in the charge. *Cf. Redwine v. AAA Life Ins. Co.*, 852 S.W.2d 10, 14 (Tex. App.—Dallas 1993, no writ) (noting that the charge "may not comment on the evidence or the weight thereof"). We overrule Choctaw's eleventh issue.

IV. Evidentiary Issues

Choctaw also challenges several of the district court's evidentiary rulings. The admission or exclusion of evidence is committed to the trial court's sound discretion. *Interstate Northborough P'ship v. State*, 66 S.W.3d 213, 220 (Tex. 2001).

A. Evidence Regarding Federal Law

Choctaw's twelfth issue contends that the district court erred in excluding evidence, including Choctaw's expert witness testimony, regarding the Federal Motor Carrier Safety Regulations (FMCSR), which are the regulations applicable to federally licensed common carriers. During opening statements, counsel referenced the FMCSR and the experts who would testify about them. However, at the conclusion of the second day of trial, the district court raised with counsel whether evidence regarding the FMCSR related solely to a question of law—the existence

of a duty—that was within the sole province of the court. After discussing the matter further with counsel, the court ruled that it would exclude such evidence, including the parties' competing expert testimony, based on Rule of Evidence 702. *See* TEX. R. EVID. 702 (permitting expert testimony if the expert's specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue). Choctaw requested a mistrial, which the court denied.

In light of the district court's rulings, the appellees filed a motion to exclude Choctaw's experts and urged grounds that tracked the court's stated concerns. The court signed an order granting the appellees' motion. Thereafter, Choctaw made an offer of proof regarding what its federal-law experts would have testified to had they been permitted. It also formally offered its experts and requested that the court reconsider its prior ruling. The court denied Choctaw's request.

Choctaw makes no specific complaint regarding the merits of the district court's evidentiary ruling regarding its FMCSR evidence. It instead contends that the ruling was "out of the blue," i.e., before the appellees had lodged an objection to its experts. Assuming that an objection was required here, the record reflects that the appellees lodged such an objection in their motion to exclude, which was filed prior to Choctaw's formal offer of its experts' testimony. Accordingly, the appellees' objection was timely. *See Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 409–10 (Tex.1998) (noting that a party may object to scientific evidence either before trial or when the evidence is offered).

Choctaw also complains that its experts were excluded without a Rule 104 hearing, which it claims should have been conducted prior to voir dire. *See* TEX. R. EVID. 104(a), (c) (requiring court to decide preliminary questions about whether a witness is qualified, and providing that such determinations should be made outside the presence of the jury "if justice so requires"). Choctaw cites no authority that a Rule 104 hearing must be conducted prior to voir dire, and the rule on its face contains no such requirement. The district court conducted a Rule 104 hearing during the trial,

as it expressly acknowledged on the record. In light of the foregoing, we conclude that the court did not abuse its discretion in excluding Choctaw's evidence regarding the FMCSR. We overrule Choctaw's twelfth issue.

B. Deposition Testimony

Choctaw's fifteenth issue urges that the trial court erred in admitting deposition testimony.

1. Liability Insurance

Over Choctaw's objection, Clutts testified that Choctaw required the independent charter companies that it retained to carry $5 million in liability insurance coverage and to include Choctaw as an additional insured under such coverage. Choctaw urges that this testimony should have been excluded under Rule 411 of the Texas Rules of Evidence. TEX. R. EVID. 411. We disagree. Rule 411 permits a court to admit evidence of liability insurance for a purpose other than proving that a party acted negligently—for example, as pertinent to this case, to prove control. *Id.* The inclusion of Choctaw as an additional insured on Cardinal's policy was relevant to the question of whether Choctaw controlled Cardinal. We thus conclude that the trial court did not abuse its discretion in admitting this evidence.

In addition, even had the trial court erred, Choctaw itself offered three police reports into evidence that referenced the name and policy number of Cardinal's insurance company. A party may not complain of the admission of improper evidence when he himself introduced the same or similar evidence. *Sw. Elec. Power Co. v. Burlington N. R.R. Co.*, 966 S.W.2d 467, 473 (Tex.1998). Choctaw has therefore waived the purported error.

2. Rieve's Driving History

The district court also admitted testimony from Rieve and two other witnesses regarding Rieve's involvement in a fatal accident in 1998 while driving a bus. Choctaw contends that this evidence should not have been admitted, based upon *Huckaby v. A.G. Perry & Son, Inc.*, 20 S.W.3d

194 (Tex. App.—Texarkana 2000, pet. denied). Our sister court in *Huckaby* held that the trial court erred in admitting evidence of prior accidents without a predicate demonstrating that the accidents occurred "'under reasonably similar but not necessarily identical circumstances.'" *Id.* at 201–02 (quoting *Missouri Pacific R.R. Co. v. Cooper*, 563 S.W.2d 233, 236 (Tex.1978)). Based on *Huckaby*, Choctaw contends that the appellees failed to establish the necessary predicate to justify the admission of evidence regarding prior accidents involving Rieve.

We conclude that *Huckaby* is distinguishable. Unlike *Huckaby*, the appellees in this case asserted a negligent retention claim against Choctaw. The evidence of Rieve's involvement in a prior fatal accident was relevant to this claim. *See Atlantic Indus., Inc. v. Blair*, 457 S.W.3d 511, 518 (Tex. App.—El Paso 2014), *reversed on other grounds*, 482 S.W.3d 57 (Tex. 2016) (per curiam) (concluding that evidence of driver's prior arrests for driving while intoxicated supported jury's finding that driver was reckless for purposes of establishing negligent entrustment claim against driver's employer); *Estate of Arlington v. Fields*, 578 S.W.2d 173, 179 (Tex. Civ. App. Tyler—1979, writ ref'd n.r.e.) (noting that in negligent hiring cases, "the servant's character is then in issue and may be proven by evidence of . . . specific conduct for the purpose of showing that the master knew or . . . should have known of the servant's incompetence"). The trial court thus did not abuse its discretion in admitting the foregoing evidence. In addition, Choctaw has not shown how the admission of the evidence was harmful given that the jury found in Choctaw's favor with respect to the negligent entrustment claim asserted against it. *See* TEX. R. APP. P. 44.1(a)(1) (precluding reversal unless error probably caused rendition of an improper judgment). For each of these reasons, we overrule Choctaw's fifteenth issue.

V. Pretrial Issues

Choctaw's thirteenth issue asserts that the district court erred in allowing the appellees to amend their petition and in denying Choctaw's motion for a continuance to obtain discovery

relevant to the appellees' newly alleged facts and theories of recovery. Thirty-two days before trial, and well after the court-ordered deadlines for pleading amendments and discovery had expired, the appellees sought leave to amend their petition to allege that Choctaw was vicariously liable based on Taylor's negligence. The district court granted the appellees' motion twenty-five days before the trial was scheduled to begin. Choctaw filed a verified motion to continue the trial so as to permit it to take additional discovery to address the appellees' amended pleading. Choctaw's motion, and its reply brief in support thereof, attached affidavits from its counsel that described the witnesses that Choctaw wished to depose in light of the appellees' amended pleadings. The court denied Choctaw's motion.

Choctaw asserts that the district court abused its discretion in allowing the appellees to "amend their pleadings to allege new theories for the imposition of vicarious liability . . . based on Taylor's conduct." Generally, a party may amend its pleadings up to the deadline unless the amended pleadings operate as a surprise to the opposing party. TEX. R. CIV. P. 63. Even after the deadline has passed, the trial court has no discretion to refuse an amendment unless (i) the opposing party presents evidence of surprise or prejudice, or (ii) the amendment asserts a new cause of action or defense, and thus is prejudicial on its face, and the opposing party objects to the amendment. *G.R.A.V.I.T.Y. Enters., Inc. v. Reece Supply Co.*, 177 S.W.3d 537, 542 (Tex. App.—Dallas 2005, no pet.). The mere fact that an amended pleading asserts a new cause of action does not prejudice the opposing party as a matter of law. *Smith Detective Agency & Nightwatch Serv., Inc. v. Stanley Smith Sec., Inc.*, 938 S.W.2d 743, 749 (Tex. App.—Dallas 1996, writ denied). Instead, the amended pleading must be evaluated in the context of the record of the entire case. *Id.*

The only prejudice that Choctaw claims from the appellees' amended petition is that it was denied the opportunity to obtain discovery related to the appellees' new allegations. The thrust of Choctaw's complaint is that the district court abused its discretion in denying Choctaw's motion

for continuance. The grant or denial of such a motion is within the trial court's sound discretion and will not be disturbed absent a clear abuse of discretion. *Villegas v. Carter*, 711 S.W.2d 624, 626 (Tex. 1986). Choctaw relies upon Rule 190.5 of the Rules of Civil Procedure, which provides that a trial court must modify a discovery control plan and allow additional discovery related to new pleadings if (i) the pleadings were filed after the discovery deadline, and (ii) the adverse party would be unfairly prejudiced without such additional discovery. TEX. R. CIV. P. 190.5(a). It cites *In re Marathon Oil (E. Tex.), L.P.*, in which our sister court held that a district court abused its discretion in denying a party's motion for continuance following pleading amendments by the opposing party that alleged, for the first time, several new claims and defenses twenty-five days before trial. No. 12-13-00182-CV, 2013 WL 4011551, at *2–3 (Tex. App. —Tyler Aug. 7. 2013, orig. proceeding) (mem. op.). The *Marathon Oil* court noted that "[a] defendant is 'not required to guess what unpleaded claims might apply and negate them.'" *Id.* at *3 (quoting *Via Net v. TIG Ins. Co.*, 211 S.W.3d 310, 313 (Tex. 2006) (per curiam)).

Of the new theories asserted by the appellees in their amended petition, the only theory that Choctaw complains about on appeal is the appellees' claim that Taylor distracted Rieve as he drove Cardinal's bus. However, the record reflects that, at least twenty months before the discovery deadline closed, the appellees had generally asserted that Cardinal was subject to Choctaw's control. Relevant to this theory, Choctaw asked Rieve and Kramer in their depositions regarding their recollection of Taylor's conduct on the bus in the moments that preceded the accident. In light of this discovery obtained by Choctaw, the trial court could have reasonably concluded that Choctaw failed to establish that it would be unfairly prejudiced if the trial deadline were not extended so that it could seek additional discovery.[4] We hold that the trial court did not abuse its

[4] In addition, even after the court denied Choctaw's continuance motion, Choctaw questioned Boultinghouse regarding Taylor's conduct in a deposition taken after the discovery deadline by agreement of the parties.

discretion in granting the appellees leave to amend and in denying Choctaw's motion for continuance. We overrule Choctaw's thirteenth issue.

VI. Pain and Suffering

Choctaw's fourteenth issue contends that the evidence is legally insufficient to support the jury's award of $3.25 million for the pain and suffering and mental anguish suffered by plaintiff Hahn as a result of the accident. The jury is afforded a great deal of discretion in awarding damages for pain and suffering. *Ten Hagen Excavating, Inc. v. Castro-Lopez*, 503 S.W.3d 463, 487 (Tex. App.—Dallas 2016, pet. denied). Evidence of past pain and mental anguish may be proven through circumstantial evidence. *Id.* If there is no direct evidence of pain, the jury may infer the occurrence of pain from the nature of the injury. *Id.* Moreover, consciousness of approaching death can be considered in evaluating mental anguish. *SunBridge Healthcare Corp. v. Penny*, 160 S.W.3d 230, 251–52 (Tex. App.—Texarkana 2005, no pet.).

Robert Pacheco, a "Good Samaritan" who witnessed the accident, entered the bus to assist. He saw Hahn pinned under an object that he could not identify. Her feet were "kind of wiggling a little bit," in an apparent attempt to free herself. With the help of another Good Samaritan, Pacheco attempted to lift up the corner of the bus to free Hahn. He was unsuccessful, and Hahn's body stopped moving thirty seconds or a minute later. In total, Pacheco estimated that less than ten minutes elapsed between the crash and when Hahn stopped moving. While Choctaw urges that Pacheco could not specify how much time elapsed until he reached Hahn's body, it does not dispute that Hahn was "using [her] feet to get out" for at least thirty seconds after Pacheco reached her and up to ten minutes after the crash.

In addition, the Dallas County Medical Examiner, Dr. Tracy Dyer, testified regarding the severity of Hahn's fatal injuries. Dyer also stated that, had she known of Pacheco's testimony when she prepared her autopsy report, she likely would have added "positional asphyxia"—i.e.,

"a pinning"—as a cause of Hahn's death in addition to the blunt force injuries that she suffered. While Dyer conceded that she could not definitively state whether Hahn experienced pain and suffering following the crash, we conclude that the foregoing evidence is legally sufficient to support the jury's award. We overrule Choctaw's fourteenth issue.

CONCLUSION

We affirm the judgment of the district court.

/Jason Boatright/
JASON BOATRIGHT
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

CHOCTAW NATION OF OKLAHOMA, Appellant

No. 05-16-01011-CV V.

LINDA SEWELL, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF ALICE WILKINSON STANLEY, RONALD STANLEY, WILLIAM STANLEY, MELISSA ENGLMAN, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF PAULA HAHN, KENNETH HILDRETH, DONNA GARNER AND KATHY BOLTON, Appellees

On Appeal from the 193rd Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-13-04381.
Opinion delivered by Justice Boatright. Justices Lang-Miers and Myers participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellees LINDA SEWELL, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF ALICE WILKINSON STANLEY, RONALD STANLEY, WILLIAM STANLEY, MELISSA ENGLMAN, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF PAULA HAHN, KENNETH HILDRETH, DONNA GARNER AND KATHY BOLTON recover their costs of this appeal from appellant CHOCTAW NATION OF OKLAHOMA.

Judgment entered this 29th day of May, 2018.