Affirmed and Opinion Filed December 31, 2024

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-23-00770-CV

SANTANDER CONSUMER USA INC., Appellant
V.
ENTERPRISE FINANCIAL GROUP, INC., Appellee

On Appeal from the 193rd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-18-08119

MEMORANDUM OPINION

Before Justices Partida-Kipness, Goldstein, and Miskel
Opinion by Justice Partida-Kipness

Appellant Santander Consumer USA Inc. (SCUSA) appeals the judgment rendered in favor of appellee Enterprise Financial Group, Inc. (EFG) following a six-day jury trial on the parties' breach of contract claims and counterclaims. After reviewing the briefs and the record and hearing oral argument, we affirm the judgment.

BACKGROUND

SCUSA sells subprime car loans and works with roughly 14,000 car dealers in the U.S. EFG sells consumer protection products that can be added to a consumer

car loan. One EFG add-on product is a guaranteed asset program (GAP), which protects consumers who owe more on a vehicle loan than their car is worth. Under a GAP policy, if the consumer's car is totaled in an accident or stolen, and the consumer's car insurance pays less than the loan balance, GAP helps pay the rest. Standard auto insurance policies only pay the insured an amount up to the value of the insured's vehicle. http://bit.ly/4fCMuMs[1] (last visited December 27, 2024). GAP is an optional product intended to cover "the gap" between the amount a consumer owes on her auto loan and the amount the insurance company pays if the car is stolen or totaled. *Id.* EFG and other companies sell GAP policies to car dealers. The dealers pay a wholesale price to the seller of the GAP policy and resell it to a consumer at a markup. According to Bryan Miller, a former SCUSA employee, dealers "generally pick [between GAP programs] on price" to maximize their profit.

SCUSA and EFG Develop the S-Guard GAP Program

In 2012, SCUSA worked with EFG to develop a private label GAP program specifically for SCUSA's loans, which they called "S-Guard GAP." On April 1, 2012, they signed the Vendor Services Agreement (VSA), which set forth their rights and duties for the S-Guard GAP program. The agreement was not exclusive. Rather, EFG sold other GAP products to other dealers, and SCUSA was free to work with other GAP providers and sell their policies instead of the S-Guard GAP policies.

---

[1] https://www.consumerfinance.gov/ask-cfpb/what-is-guaranteed-asset-protection-gap-insurance-en-797/

Three companies, SCUSA, EFG, and Arch Insurance, were initially involved with the S-Guard GAP program. EFG was responsible for administering the GAP policies by keeping track of policies sold and claims submitted. SCUSA was responsible for selling GAP policies by marketing them to car dealers as add-ons to its loans. Arch Insurance was the underwriter for the S-Guard GAP program. Arch was responsible for paying GAP claims and refunds if the reserves were not enough. To do so, Arch took part of the premiums consumers paid for the GAP policy and held those funds as "reserves" to pay claims and refunds. Arch also issued an insurance policy backing the GAP policies.

When the S-Guard GAP program started, the wholesale cost to car dealers for a policy under the program was $235. Of that $235, SCUSA received a $90 marketing commission, EFG received a $20 administrative fee, Arch received a $10 fee to insure the policy, and the remaining $115 was held in reserves. EFG and Arch worked together to determine that pricing based on information SCUSA provided about its loans in an insurance application to Arch. A key input to price a GAP program is the loan portfolio's loan-to-value (LTV) ratio.[2] SCUSA's insurance application stated only two to five percent of its loans had a starting LTV ratio of more than 120%. The application also stated SCUSA's average starting LTV ratio

[2] A loan-to-value (LTV) ratio is "a financial ratio that compares the amount of money being borrowed to the market price of the asset being purchased." https://www.investopedia.com/terms/l/loantovalue.asp (last visited December 27, 2024). "Typically, loan assessments with high LTV ratios are considered higher-risk loans." *Id.*

was 110 percent. The VSA capped all payments at 125% of the vehicle value, which meant if a loss exceeded 125% of the vehicle value, the policy would not pay anything over the 125% cap.

John Pappanastos, EFG's President and Chief Executive Officer, explained why the LTV ratio, loan interest rates, length of the loans, and expected cancellations are key inputs to determine the price of a GAP program policy:

> Well, they determine the size of either the severity of your claim or the number of claims you're going to get. For example, if they have a very long loan term or a very high interest rate, they're going to have a big payoff. There's going to be a large GAP claim. And GAP claims can differ from 2,000 to 50,000, so it's a very big difference.

He also testified that, to perform well, the pattern of new reserves from policy sales should match the pattern of claim payments. Miller testified that GAP pricing would be adjusted based on how the program was performing. SCUSA's Senior Vice President of Credit Operations Chad Bronson agreed and told the jury that a GAP administrator like EFG would need to know various metrics, including loan performance and percentage of defaults, to determine if price increases are needed.

Section 4.2 of the VSA allowed EFG to increase the "Company Cost" (the reserve amount plus EFG's fee) "upon one hundred twenty ('120') days advance written notice to [SCUSA]." However, all increases had to be "mutually agreeable to" SCUSA. Section 4.8 of the VSA imposed duties on SCUSA to ensure the program's viability. SCUSA had to use "commercially reasonable efforts" to generate sales of GAP policies by marketing them to car dealers. Section 5.1.1

required SCUSA to timely report information to EFG about the GAP program, which included providing EFG with weekly reports on "sales information." Consumers could cancel GAP policies any time and receive a pro rata refund, and GAP policies could also be cancelled for other reasons, like repossessions. SCUSA included both sales and cancellations in its weekly reports because a cancellation was effectively "a negative sale." Under section 17.8 of the VSA, SCUSA and EFG were required to "immediately notify the other in writing of any change in their business operations, financial condition, licenses or regulatory approvals if the change is likely to have a material adverse effect on such Party's ability to perform its obligations under this Agreement."

Arch withdrew as underwriter for the S-Guard GAP program in August 2013. EFG took on Arch's underwriting duties in addition to EFG's duties as administrator. In doing so, EFG held the reserves and bore the risk that, if the program was mismanaged, reserves would be insufficient to pay claims and refunds.

Events Leading to the Underlying Litigation

Over the next five years, several events occurred, which would lead to the underlying litigation.

A. EFG requests price increases to fix depleting reserves

In August 2014 and in early 2015, EFG suggested to SCUSA that they increase GAP pricing, which would increase the amount each policy contributed to reserves. EFG suggested the increases because EFG noticed the claim frequency and

claim amounts were more than it expected. Based on this data, EFG believed the reserves would soon be unable to cover all claims. SCUSA refused both requests for increases. According to Pappanastos, when EFG made its first request, SCUSA told EFG it was "really early" to decide whether an increase was needed and assured EFG that it would "work through it when we get there" and that "[i]t will be easy to correct." When it rejected the second request, SCUSA said it was "too early" to decide whether an increase was necessary and, instead, asked EFG hire an actuary to assess whether they needed to increase prices. The VSA did not require EFG to justify price increases with actuarial analysis. Nonetheless, EFG hired GPW Actuarial Services (GPW) to analyze the GAP program.

GPW presented its first analysis in November 2015. GPW's analysis showed the S-Guard GAP program was losing $1.75 for every dollar it added to reserves. For the program to break even over two years, GPW determined EFG needed to increase the amount of reserves for each new GAP policy from $115 to $270. SCUSA refused that proposed increase and asked for analyses showing prices that would cause the program to break even over three- and four-year periods.

GPW presented the second analysis in December 2015. In that analysis, GPW determine EFG needed to increase reserves from $115 to $247 per policy to break even over three years or from $115 to $236 to break even over four years. SCUSA refused the price increase at that time. In August 2016, however, SCUSA agreed to increase the amount of reserves per new policy an average of $13 (i.e., from $115 to

$128 on average per policy). The exact increase varied based on the length of the loans and its LTV ratio. The parties amended the VSA to adopt the new pricing schedule. The amendment also removed the 125 % LTV coverage cap from S-Guard GAP policies, which meant EFG would now be responsible for paying all losses, including those exceeding 125% of the vehicle value.

B. SCUSA stops providing incentives for the sale of S-Guard GAP policies

In late 2015, Pappanastos learned SCUSA had stopped paying incentives for the sale of the S-Guard GAP program. Without telling EFG, SCUSA shut down the credit buyer incentive in early 2015 and had stopped the area sales manager incentive "years earlier." Discovery in the underlying proceeding also revealed that, by December 2015, SCUSA buyers were prohibited from marketing S-Guard products to any Nissan dealerships. EFG did not know of this change before filing the underlying lawsuit. SCUSA also removed all monetary incentives for its representatives selling the program and threatened them with "disciplinary action up to and including termination" if the buyer was caught marketing S-Guard to Nissan dealerships.

C. CFPB investigates SCUSA

In 2014 or 2015, EFG learned from the Consumer Financial Protection Bureau (CFPB) that CFPB was investigating SCUSA's marketing practices for the S-Guard GAP policies. The investigation resulted in a 2018 consent order finding that SCUSA "engaged in deceptive acts or practices in marketing its S-GUARD GAP

add-on product." The CFPB found that SCUSA told consumers a GAP policy would cover their whole outstanding loan balance. However, the policies under the original S-Guard GAP program would not cover the whole outstanding loan balance if the borrower's loan had a starting LTV ratio of more than 125 percent. The investigation found that SCUSA misled consumers by failing to tell them about this LTV cap beginning in April 2012 when the program commenced. The CFPB ordered SCUSA to follow a compliance plan and pay back approximately $9 million in cash and statement credits.

D. EFG discovers a high percentage of SCUSA loans exceeded the 125% LTV cap

In mid-2016, EFG analyzed the SCUSA loan data tied to the GAP policies. Through that analysis, EFG discovered the average LTV ratios were much higher than SCUSA had represented. Approximately one quarter of the loans had an LTV ratio of more than 125%. According to Pappanastos, the data revealed that SCUSA's loan portfolio was much riskier than SCUSA had represented. EFG also concluded the high percentage of loans over the 125% LTV cap showed that SCUSA had materially changed its business and increased the risk to EFG without telling EFG.

E. SCUSA reveals it failed to report 7,408 GAP policy cancellations between 2013 and 2015

In the summer of 2016, SCUSA revealed that its weekly reports to EFG had not included 7,408 GAP policy cancellations between 2013 and 2015. Each of those cancellations required a refund from reserves. Pappanastos testified that the "7,400

policy cancellations represented 41 percent of all the cancellations [EFG] had received before that point." He described the data as "a massive change in what we knew to be realty." Most of the non-disclosed cancellations resulted from SCUSA's vehicle repossessions, so SCUSA received those refunds to be applied to the loan balance. Moreover, when SCUSA submitted its "cleanup" reports revealing the cancellations, EFG was then required to refund much of the reserves in a short period of time. Those refunds depleted the amount of reserves available to pay future claims.

Mark Rappaport, EFG's Chief Information Officer, explained why the cancellation issues were problematic:

> By not canceling GAP products in a timely manner, it understates issues until the -- until the cancellations occur. You make projections for underwriting based on cancellations and claims experience. If the cancellations are understated, you lower your rates or you have rates that fulfill the obligations of the -- of the contract.
>
> When cancellations don't occur in a timely fashion and you force them in six months, a year, two years later, it shows that you were understating your need for reserves.

EFG's actuarial expert, Grover Edie, and Pappanastos testified that the lack of accurate data adversely effected EFG's ability to underwrite the GAP program. Moreover, EFG did not know of all the unreported cancellations when the parties agreed on the small price increase in August 2016. After learning of the unreported cancellations, EFG had GPW reassess the GAP program to account for the newly depleted reserves. GPW projected the GAP program was on track to lose $14 million

and recommended increasing the reserve amount to $325 per policy. SCUSA did not agree to GPW's recommended price increase, or to any increase that would preserve the program. Policy sales plummeted when SCUSA removed sales incentives and stopped marketing the S-Guard GAP polices. By May 2016, sales had gone "negative," meaning that monthly cancellations exceeded new policy sales. It was Pappanastos's view that SCUSA "basically shut off the program while they were negotiating with us, but didn't mention it." Edie agreed with that assessment and testified that SCUSA "shut off the flow of contracts."

EFG terminates the VSA

In December 2016, EFG told SCUSA the parties had two options. They could "raise the reserve to an appropriate level and see if we get enough volume to continue to offer the program, or terminate it." SCUSA responded that it would "do whatever needs to be done with this program." SCUSA did nothing and, on May 2, 2017, EFG sent SCUSA a notice of termination of the S-Guard GAP program effective August 30, 2017. As of June 2017, EFG stopped paying GAP claims on SCUSA loans and stopped refunding premiums to SCUSA for cancelled policies. However, EFG continued to administer GAP policies all the way up to the trial.

All reserves were gone by the time EFG terminated the VSA. Total claims and refunds "exceeded reserves by 14 million," just as GPW had projected, EFG "ate" $6 million of that deficit out of pocket before it stopped paying claims.

PROCEDURAL HISTORY

In June 2018, EFG sued SCUSA for breach of contract. In its Original Petition, EFG set out twenty-nine factual paragraphs, which were incorporated by reference within its claim for breach of contract. EFG then pleaded that SCUSA "intentionally, willfully and materially breached the Agreement in each of the following separate and distinct ways:

> a. Selling GAP policies on loans that did not conform with the Agreement;
>
> b. Failing to inform EFG of GAP cancellations and failing to correct the numbers in EFG's Reports, which Santander knew to be incorrect;
>
> c. Providing inaccurate "sales information" that concealed cancellations, materially affecting the viability of the program;
>
> d. Failing to notify EFG of material changes in its business operations, including taking away incentives for Santander employees to sell the GAP product and eliminating loans made to a major U.S. auto manufacturer's clients from the prospective client base; and
>
> e. Failing to provide timely information such that EFG could request price increases earlier, then delaying consideration of requested increases and refusing to agree to the amounts requested."

SCUSA generally denied EFG's allegations and pleaded affirmative defenses. SCUSA also counterclaimed against EFG for breach of contract. SCUSA alleged EFG breached the contract by terminating the VSA without following the contract's notice provision and by refusing to pay GAP claims after termination.[3] EFG denied

[3] Section 6.2(b) of the VSA provided that SCUSA or EFG could terminate the VSA on 120 days' notice. Section 6.2(d) provided that, in the event of a material breach, a party was required to give the other party notice and an opportunity to cure. SCUSA maintains section 6.4(e) provided that EFG's obligations to pay on the contracts that had already been sold would survive termination of the agreement.

SCUSA's counterclaim. EFG also asserted defenses to the counterclaim, including that EFG's performance was excused because of SCUSA's material breach of the VSA.

After a six-day trial in October and November 2022, a non-unanimous jury found EFG and SCUSA both breached the contract and suffered damages (SCUSA $4.2 million and EFG $5 million), SCUSA breached first, SCUSA's breach was a material breach, SCUSA's breach was not excused, SCUSA's breach was not the result of gross negligence, bad faith, or willful conduct, EFG's breach was excused, and EFG's breach was the result of gross negligence, bad faith, or willful misconduct. The trial court signed a Final Judgment on May 9, 2023. In it, the trial court disregarded as immaterial the jury's answers to Question 9B, which concerned SCUSA's damages, and Question 10, which asked if either party was entitled to a set off, rendered judgment for EFG, including $5,000,000 in damages plus interest, attorney's fees, and expert fees, and rendered a take nothing judgment against SCUSA. The trial court denied SCUSA's post-judgment motions by written order on July 25, 2023, and this appeal followed.

ANALYSIS

In five issues, SCUSA contends a new trial is necessary due to charge error, the admission of evidence concerning unpleaded theories of breach, and insufficient evidence to support the amount of damages awarded to EFG. We address issue in turn.

I. Charge Error

On appeal, SCUSA contends a new trial is required because the trial court committed three reversible errors regarding the jury charge. We review alleged charge error for an abuse of discretion. *Jones-Adegboyega v. Foerch Fam. Tr.*, No. 05-21-00051-CV, 2022 WL 2093005, at *2 (Tex. App.—Dallas June 10, 2022, no pet.) (mem. op.) (first citing *Tex. Dep't of Hum. Servs. v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) (superseded on other grounds by rule); and then citing *Rosell v. Cent. W. Motor Stages, Inc.*, 89 S.W.3d 643, 653 (Tex. App.—Dallas 2002, pet. denied))).

A. Applicable law

To preserve error in the charge, the court must be informed of the error before the charge is formally submitted to the jury. *Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 817, 830 (Tex. 2012) (citing TEX. R. CIV. P. 272). "A charge filed before trial begins rarely accounts fully for the inevitable developments during trial. For these reasons, our procedural rules require that requests be prepared and presented to the court 'within a reasonable time after the charge is given to the parties or their attorneys for examination.' " *Id.* at 831 (quoting TEX. R. CIV. P. 273). "Although trial courts must prepare and deliver the charge, we cannot expect them to comb through the parties' pretrial filings to ensure that the resulting document comports precisely with their requests—that is the parties' responsibility." *Id.* "[T]he aggrieved party must show that the trial court was aware of the party's request and denied it." *Id.* at 830. The trial court's awareness "is the key." *Id.* at 831.

To that end, the rules require specificity when making objections and requests. Rule 274 provides, "A party objecting to a charge must point out distinctly the objectionable matter and the grounds of the objection." TEX. R. CIV. P. 274. "Any complaint as to a question, definition, or instruction, on account of any defect, omission, or fault in pleading, is waived unless specifically included in the objections." *Id.* "The rule creates a two-pronged test: objections to the charge must specify the error and the legal basis of the objection." *Sears, Roebuck & Co. v. Abell*, 157 S.W.3d 886, 892 (Tex. App.—El Paso 2005, pet. denied) (citing *Castleberry v. Branscum*, 721 S.W.2d 270, 276-77 (Tex. 1986)). Rule 274 is strictly construed and embodies a "rigorous standard for sufficiency of charge objections." *Meyers v. 8007 Burnet Holdings, LLC*, 600 S.W.3d 412, 421–22 (Tex. App.—El Paso 2020, pet. denied) (quoting *Abell*, 157 S.W.3d at 892).

"Our procedural rules are technical, but not trivial." *Burbage v. Burbage*, 447 S.W.3d 249, 258 (Tex. 2014). And, although we construe those rules liberally so that the right to appeal is not lost unnecessarily, "we cannot make assumptions" when an objection fails to explain the nature of the error. *Id.* "Preservation of error reflects important prudential considerations recognizing that the judicial process benefits greatly when trial courts have the opportunity to first consider and rule on error." *Id.* "Any complaint as to a question, definition, or instruction, on account of any defect, omission, or fault in pleading, is waived unless specifically included in the objection." *Clark v. Dillard's, Inc.*, 460 S.W.3d 714, 729–30 (Tex. App.—Dallas

2015, no pet.) (quoting TEX. R. CIV. P. 274). To preserve error, the objection must state "the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context." TEX. R. CIV. P. 33.1(a). If an objection is not sufficient to apprise the trial court of the issue a party later claims is error on appeal, the issue must be overruled. *Meyers*, 600 S.W.3d at 422–24. Moreover, failure to timely object to error in a jury charge waives that error. *Childress Eng'g Servs., Inc. v. DeLeon*, No. 05-16-00429-CV, 2017 WL 5898520, at *2 (Tex. App.—Dallas Nov. 29, 2017, pet. denied) (mem. op.) (first citing TEX. R. CIV. P. 272, 274; and then citing *Equistar Chems., L.P. v. Dresser–Rand Co.*, 240 S.W.3d 864, 868 (Tex. 2007)).

B. The alleged charge errors

On appeal, SCUSA contends a new trial is required because the jury charge included three errors. We will review each alleged error in turn.

1. *Casteel* error concerning SCUSA's liability for breach of contract

First, SCUSA argues the broad form submission of Question No. 1, which asked if SCUSA failed to comply with the agreement, violated *Casteel*. *See Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000); *see also Benge v. Williams*, 548 S.W.3d 466, 474 (Tex. 2018). Question No. 1 read:

QUESTION NO. 1 (BREACH OF CONTRACT – SC)

Did SC fail to comply with the agreement?

Answer “Yes” or “No”

(emphasis in original). The jury answered “Yes.” SCUSA maintains the broad form submission erroneously allowed the jury to consider legally invalid theories of breach.

If there is an error in the charge, a party must object. TEX. R. CIV. P. 272, 274. SCUSA did not object to the submission of Question No. 1 at the charge conference or before the charge was read to the jury. SCUSA, therefore, did not preserve error. TEX. R. CIV. P. 272, 274; *Equistar Chems., L.P.*, 240 S.W.3d at 868; *Childress Eng'g Servs.*, 2017 WL 5898520, at *2.

SCUSA maintains it preserved error because it submitted a “Proposed Charge of the Court and Jury Questions” to the trial court, and the trial judge refused SCUSA's proposals by marking “Refused” on the first page of the submission and signing her name. This is incorrect. “[T]he use of a global denial of objections and requests based solely on the parties' pretrial submission of proposed jury charges does not preserve issues of charge error for appellate review.” *EYM Diner L.P. v. Yousef*, No. 05-19-00636-CV, 2020 WL 6883171, at *9 (Tex. App.—Dallas Nov. 24, 2020, pet. dism'd) (mem. op.) (first citing *Clark*, 460 S.W.3d at 729–30; and then citing TEX. R. CIV. P. 272, 273, 274)). “The reason is simple; a proposed jury charge filed pretrial standing alone does not meet the preservation of error requirements of rules 272, 273, and 274.” *EYM Diner L.P.*, 2020 WL 6883171, at *9–10.

Moreover, although the trial court refused SCUSA's proposed jury charge and jury questions in toto, that did not preserve error for the challenge asserted on appeal because SCUSA did not object to Question No. 1 itself. *E.g.*, *Texienne Oncology Ctrs., PLLC v. Chon*, No. 09-19-00356-CV, 2021 WL 4994622, at *9 (Tex. App.—Beaumont Oct. 28, 2021, pet. denied) (mem. op.) ("Tendering a proposed jury question or instruction will not suffice to preserve error when a proper objection has not been made to the question or instruction submitted.") (citing *Kirkpatrick v. Mem'l Hosp. of Garland*, 862 S.W.2d 762, 769 (Tex. App.—Dallas 1993, writ denied)); *see also* TEX. R. CIV. P. 272, 274; *Childress Eng'g Servs.*, 2017 WL 5898520, at *2. The purpose of the formal jury charge conference is to preserve error. And objecting to the questions, definitions, or instructions in a trial court's jury charge at the formal charge conference is always the first step to preserve charge error. The trial court must be given an opportunity to consider a party's objection and rule on that objection. SCUSA did not give the trial court that opportunity here. We, therefore, overrule SCUSA's challenge to Question No. 1. *See*, *e.g.*, *EYM Diner L.P.*, 2020 WL 6883171, at *12, 13.

2. *Harris County v. Smith* error in submission of Question 8B concerning EFG's damages

Next, SCUSA argues Question 8B of the jury charge erroneously mixed valid and invalid elements of damages. Questions 8A and 8B[4] submitted EFG's breach of contract damages to the jury:

> **<u>Question 8A (Gross Negligence, Bad Faith, or Willful Misconduct)</u>**
>
> **Was SC's breach of the Vendor Services Agreement the result of gross negligence, bad faith, or willful misconduct?**
>
> > "Gross negligence" means either (1) a reckless indifference to or a deliberate disregard of the provisions of the Agreement; or (2) actions that are outside the bounds of reason.
> >
> > "Bad faith" is more than negligence or lack of diligence. Bad faith implies an intent to injure, or some other improper motive. Mere bad judgment-does not qualify as bad faith.
> >
> > Similarly, "willful misconduct" requires evidence of a specific intent by SC to cause substantial injury to EFG.

(emphasis in original). The jury answered "No" to Question 8A. Question 8B read:

> **<u>Question 8B (EFG Damages)</u>**
>
> **What sum of money if paid now in cash, would fairly and reasonably compensate EFG for its damages, if any.**
>
> Answer separately in dollars and cents for damages, if any/ Do not add any amount for interest on damages, if any.

(emphasis in original). The jury answered $5,000,000.00. At the charge conference, SCUSA's counsel made the following objection to Question 8B:

> MR. SHAW: Yes, Your Honor, we note our objection to Question No. 8. EFG breached contract damages 8A and 8B. Under the contract at

---

[4] Question No. 8 was predicated on the jury finding SCUSA failed to comply with the agreement in Question No. 1.

> issue, there is a delineation between direct damages and consequential damages. Consequential damages can only be awarded in a finding of gross negligence, bad faith or willful conduct.
>
> As it reads we think that the damages provision opens it up to an award of either direct or consequential without a first finding of first negligence, bad faith or similarly wrongful conduct and we likewise think that the gross negligence bad faith and wrongful conduct instruction should be given under the contract -- because of the contract and because Plaintiffs have failed to elicit any evidence of loss profit and therefore, they can't be meet their evidentiary burdens and therefore there should only be instructions for direct damages.

When asked for a response, EFG's counsel stated:

> MR. MANLEY: Yes, Your Honor. I think the evidence does support the submission of this question. We've had this argument off the record. And I think this actually asking the question of whether the jury finds gross negligence, bad faith or willful misconduct speaks to the provision of the contract that allows the recovery of any damages. Plaintiff and Defendant to not agree what damages are what. But this allows the jury to make a finding that that will allow the Court if necessary to revisit the damages number after trial and that's the best approach that we have and that way we can get the jury gone and they don't have to come back.

The trial court overruled SCUSA's objection. SCUSA's counsel then stated he "was just going to note for the sake of the record, Your Honor, PJC.4 and PJC.5."[5] SCUSA's counsel provided no further explanation. The trial court again overruled the objection.

On appeal, SCUSA argues Question 8B violated *Harris County v. Smith*, because it allowed the jury to award EFG damages for lost profits and consequential

[5] We note, the Texas Pattern Jury Charges do not have any provisions numbered "PJC.4" or "PJC.5." Sections 115.4 and 115.5 of the Texas Pattern Jury Charges–Business, Consumer, Insurance & Employment, set out sample instructions for contract damages.

damages, which SCUSA argues were not recoverable under the VSA without a finding that SCUSA's breach was the result of gross negligence, bad faith, or willful misconduct. *See Harris Cnty. v. Smith*, 96 S.W.3d 230 (Tex. 2002). EFG maintains that SCUSA's challenge to Question 8B fails because SCUSA waived any *Harris County* error by failing to object on that ground, and any error was harmless because the jury awarded EFG its $5 million out-of-pocket net loss and not lost profits.

In *Harris County v. Smith*, the Texas Supreme Court held it is error for the trial court to submit a broad-form jury question on damages that includes valid and invalid elements of damages, and that such an error is harmful when it prevents the appellate court from determining whether the jury based its damages finding on valid or invalid elements. *Harris Cnty.*, 96 S.W.3d at 234; *see also* TEX. R. APP. P. 44.1(a)(2) (error is harmful if it "probably prevented the appellant from properly presenting the case to the court of appeals"). An element of damages is "invalid" if it is not supported by any evidence. *Kelley & Witherspoon, LLP v. Hooper*, 401 S.W.3d 841, 853 (Tex. App.—Dallas 2013, no pet.) (first citing *Smith*, 96 S.W.3d at 231–32; and then citing *Thota v. Young*, 366 S.W.3d 678, 680 (Tex. 2012) (noting that error is reversible if a "broad-form question commingles damage elements that are unsupported by legally sufficient evidence")). The inclusion of a "factually unsupported claim" is not, however, automatically harmful error. *Id.* Rather, the error is harmless if the appellate court is reasonably certain the jury was not

significantly influenced by the inclusion of the erroneous issue. *Id.* (citing *Romero v. KPH Consolidation, Inc.*, 166 S.W.3d 212, 227–28 (Tex. 2005)).

To preserve error, SCUSA was required to assert " '[a] timely objection, plainly informing the court that a specific element of damages should not be included in a broad-form question because there is no evidence to support its submission, . . .' " *Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W.3d 213, 229 n. 17 (Tex. 2019) (quoting *Harris Cnty.*, 96 S.W.3d at 236). SCUSA's objections to Question 8B, however, were multifarious and did not plainly inform the trial court of the alleged error.

First, SCUSA asserted the broad-form question could allow the jury to award "either direct or consequential without a first finding of first negligence, bad faith or similarly wrongful conduct." This is an objection to the lack of an instruction predicating damages on a finding of gross negligence, bad faith, or other wrongful conduct. It did not preserve the error complained of on appeal because it did not alert the trial court to the complaint that one of the elements of damages included in the broad-form finding was unsupported by the evidence. *See Burbage*, 447 S.W.3d at 257 (explaining that to preserve error, "the objection must apprise the trial court of the error alleged such that the court has the opportunity to correct the problem"). Although we construe procedural rules liberally, "when an objection fails to explain the nature of the error, we cannot make assumptions." *Id.*

Next, SCUSA stated it "thinks that the gross negligence bad faith and wrongful conduct instruction should be given under the contract." This objection either complains of the lack of an instruction on gross negligence, bad faith, and other wrongful conduct, or complains of the placement in the charge of Question 8A, which asked if SCUSA's breach was the result of gross negligence, bad faith, or willful misconduct. Either way, it did not preserve the error complained of on appeal. *See Burbage*, 447 S.W.3d at 258.

Finally, SCUSA argued "there should only be instructions for direct damages" because EFG did not elicit any evidence of lost profits. Because SCUSA argued there was no evidence of lost profits, this objection came closer to meeting the requirement that SCUSA "plainly" inform the court that a specific element of damages should not be included in a broad-form question because there is no evidence to support its submission. However, SCUSA did not specifically argue that the question itself presented an improper amalgamation of damages by allowing the jury to find lost profits and direct damages in a single answer, nor did SCUSA ask the trial court to include separate blanks requiring the jury to specify the amount of damages for direct and for consequential damages. Under this record, we conclude SCUSA did not preserve error premised on *Harris County v. Smith*. *See*, *e.g.*, *Hani v. Jimenez*, 264 S.W.3d 881, 887 (Tex. App.—Dallas 2008, pet. denied) (party did not preserve error where his "objection only attacks the pecuniary loss element of the broad damages question on no evidence grounds.").

Even if we presume error, however, we conclude any error was harmless because it does not prevent this Court from determining whether "whether the jury based its verdict on an improperly submitted invalid" element of damage and did not probably cause the rendition of an improper judgment. *See Harris Cnty.*, 96 S.W.3d at 234 (first quoting *Casteel*, 22 S.W.3d at 388; and then citing TEX. R. APP. P. 61.1(b)); *see also Thota*, 366 S.W.3d at 687. As discussed below, the evidence was sufficient to support a finding that EFG suffered consequential, out-of-pocket damages of $5 million. *See* Section III *infra*.

3. Refusal to submit a question on SCUSA's waiver defense

SCUSA also contends the trial court erred by refusing to submit a question on SCUSA's waiver defense; specifically, whether EFG waived its right to terminate the VSA by electing to treat the VSA as continuing after SCUSA's breach. At the charge conference, SCUSA did not object to the charge's omission of a question on SCUSA's waiver defense. SCUSA, therefore, failed to preserve error. TEX. R. CIV. P. 272, 274 (if there is an error in the charge, a party must object). Although the trial court refused SCUSA's proposed jury charge and jury questions in toto, that did not preserve error for the challenge asserted on appeal because SCUSA did not object to the failure to include a question on waiver. *See*, *e.g.*, *EYM Diner L.P.*, 2020 WL 6883171, at *12, 13. We, therefore, overrule SCUSA's challenge to that omission.

II. Admission of Evidence and Arguments Regarding Unpleaded Theory of Breach

In its second issue, SCUSA argues a new trial is necessary because EFG was permitted to present evidence and argument on an unpleaded theory of breach over SCUSA's objections. The purported "unpleaded theory of breach that EFG invented midway through trial" was the allegation that SCUSA breached Section 17.6 of the VSA by failing to provide notice of regulatory investigations. Section 17.6 of the VSA stated:

> 17.6 Notice of Litigation - Each Party shall immediately notify the other of any pending or threatened litigation, proceeding or governmental investigation, or of any issued order, injunction or decree which is reasonably expected to have a material adverse effect on this Agreement or the Services to be provided hereunder.

SCUSA maintains the trial court overruled SCUSA's objections to EFG's presentation of this theory of breach. The record cites provided by SCUSA, however, do not show SCUSA lodged objections on that basis during trial.

The first objection SCUSA relies on occurred during the direct examination of Pappanastos:

> Q. Did there come a time in which you learned that there were certain governmental agencies that began investigating Santander with respect to LTV and/or use of the GAP program?
>
>> [SCUSA COUNSEL]: Object, You Honor. He has already testified - - well, foundation and relevance. It doesn't go to the claim in the case, Your Honor.
>>
>> THE COURT: Overruled.

SCUSA's objection does not allege that EFG is improperly asserting an unpleaded claim. Nor did counsel mention Section 17.6 of the VSA. Moreover, Pappanastos then went on to testify that, yes, he learned about the government investigations from sources other than SCUSA. No objections were lodged by SCUSA during that testimony. This objection, therefore, did not preserve error. *See* TEX. R. APP. P. 33.1.

Second, SCUSA argues this error was preserved by an objection to a demonstrative aid used by EFG. The following exchange occurred during a court recess outside the presence of the jury:

> [SCUSA COUNEL]: Mr. Manley had a presentation and was apparently asking questions about a provision of the agreement that requires notice in the event of a loss. That is not something that was alleged in the Complaint or presented in opening argument, so we want to lodge our objections to evidence being presented on that now.
>
> THE COURT: Okay. So it's my understanding y'all looked at all of this beforehand, right?
>
> [SCUSA COUNSEL]: That was brand new to us. They had not shown it in the opening.
>
> THE COURT: Well, it was my understanding that all the demonstratives -- did you guys insert some new demonstratives?
>
> [EFG COUNSEL]: That was a new one as of today. He can object to the demonstrative. I showed it to him in real time. He looked at it, and that's a different objection that they're try to make now. What they're saying is we don't have a right to prove whatever breach is consistent with their Notice of Pleading, which is a breach to the contract. There's no law that says anywhere that someone would have to put down everything in a petition that amounts to a breach. It's a Notice of Pleading, Judge. I mean, we all know that. So I don't know what the objection is.
>
> THE COURT: Well, it's a demonstrative.

> [SCUSA COUNSEL]: We're not seeking to exclude the demonstrative. We want to ensure that they're not going to seek a verdict on a breach of that provision, which was never raised in a pleading.
>
> [EFG COUNSEL]: No, we absolutely are. Texas is a Notice Pleading state. We said you have breached the contract, and we are proving up breaches now. We only have to have one breach. The jury has five to pick from. They can pick any of them.
>
> THE COURT: Okay. So your official objection is you're asking it to be struck or --
>
> [SCUSA COUNSEL]: Or -- you have a motion in limine ruling on this already.
>
> THE COURT: Yes.
>
> [SUCSA COUNSEL]: Just simply to enforce that and ensure there's argument.
>
> THE COURT: We're not that there yet, though.
>
> [SCUSA COUNSEL]: And the only reason I'm raising it now, Your Honor, is to ensure that there's no consideration of that we haven't raised it timely or that we are not speaking out.
>
> THE COURT: It's so noted, Mr. Manley. Like look, we're going to deal with the motion in limine down the road. I'm working on it as we speak, so I mean, you can make those arguments at that time. Right now, you know -- so noted your objection.
>
> [SCUSA COUNSEL]: Thank you, Your Honor.

Again, the objection made by SCUSA's Counsel did not mention Section 17.6 and did not articulate that SCUSA objected to EFG asserting unpleaded theories of breach. This objection was insufficient to put the trial court on notice of the actual objection and, therefore, did not preserve error. *See* TEX. R. APP. P. 33.1 (to preserve error for appellate review, the complaining party must timely and specifically object to the evidence and obtain a ruling); *see also Duncan Litig. Invs., LLC v. Watts*, No.

13-18-00265-CV, 2019 WL 2462349, at *7 (Tex. App.—Corpus Christi–Edinburg June 13, 2019, no pet.) (mem. op.) ("The cardinal rule of error preservation is that an objection must be clear enough to give the trial court an opportunity to correct the alleged error.") (citing *Arkoma Basin Expl. Co. v. FMF Assocs. 1990-A, Ltd.*, 249 S.W.3d 380, 387 (Tex. 2008)).

Third, SCUSA relies on the trial court's refusal to allow SCUSA to introduce five exhibits it maintains were needed to respond to "EFG's new theory." On the fourth day of trial, SCUSA offered five exhibits for admission into evidence. SCUSA had not previously designated the exhibits as trial exhibits. When asked why SCUSA was offering them "at this late stage," SCUSA's counsel argued SCUSA did not know the exhibits were needed until EFG "announced their intention to assert a new claim and had a new demonstrative regarding a new contractual provision" the previous day of trial. The trial court refused to admit the exhibits "due to not being disclosed timely per the Court's orders." Although SCUSA's counsel argued the exhibits should be admitted to address EFG's "new claim," SCUSA did not articulate that SCUSA objected to EFG asserting unpleaded theories of breach. Offering exhibits into evidence was insufficient to put the trial court on notice of the actual objection and, therefore, did not preserve error. *See* TEX. R. APP. P. 33.1.

Moreover, SCUSA waived its allegation of insufficient pleadings by failing to file special exceptions to EFG's petition. *See* TEX. R. CIV. P. 90; *see also Whacep, Inc. v. Cong. Fin. Corp.*, No. 03-02-00111-CV, 2003 WL 21087997, at *2–3 (Tex.

App.—Austin May 15, 2003, no pet.) (mem. op.). Further, SCUSA did not object to the jury charge question concerning SCUSA's breach on this basis or on any other grounds. For these reasons, SCUSA failed to preserve this issue for review. We overrule SCUSA's second issue.

III. Sufficiency of the Evidence to Support Damages Awarded to EFG

In its third issue, SCUSA maintains a new trial is required because there was no evidence to support the damages awarded to EFG. We disagree.

When a party challenges the legal sufficiency of the evidence to support an adverse finding on which it did not have the burden of proof, the party must demonstrate that no evidence supports the finding. *Graham Cent. Station, Inc. v. Peña*, 442 S.W.3d 261, 263 (Tex. 2014) (per curiam); *Oncor Elec. Delivery Co. LLC v. Quintanilla*, No. 05-19-01331-CV, 2022 WL 9809712, at *3 (Tex. App.—Dallas Oct. 17, 2022, pet. denied) (mem. op.). Evidence is legally insufficient when (1) there is a complete absence of evidence of a vital fact in the record, (2) the court is barred from considering the only evidence presented to prove a vital fact, (3) the evidence presented to prove a vital fact is no more than a mere scintilla, or (4) the evidence conclusively establishes the opposite of a vital fact. *City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex. 2005). In determining whether there is legally sufficient evidence to support a jury's finding, we review the entire record in the light most favorable to the verdict. *Id.* at 807, 822, 827. We credit favorable evidence if a reasonable juror could and disregard contrary evidence unless a reasonable juror

could not. *Id.* at 807, 827. "The final test for legal sufficiency must always be whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review." *Id.* at 827.

Here, the jury awarded EFG damages of $5 million. EFG maintains those damages were the out-of-pocket net losses EFG suffered from paying GAP claims after the reserves ran out. EFG relies primarily on the testimony of Pappanastos to support this argument. SCUSA argues there is no evidence to support that damages award. SCUSA maintains the testimony of EFG's expert, Erica Bramer, constituted no evidence of damages and the testimony of Pappanastos constituted no evidence the alleged $5 million loss was caused by any breach by SCUSA. We conclude the testimony of Pappanastos was sufficient to support the award of $5 million to EFG.

Pappanastos testified the S-Guard GAP program collected more than $9 million in reserves and paid about $24 million in claims, which meant EFG "lost 14 million" because the "[c]laims exceeded reserves by 14 million."[6] According to Pappanastos, EFG "ate" $6 million of that deficit before it terminated the contract and stopped paying claims. He told the jury the $6 million was out-of-pocket loss paid from EFG's operating budget. Pappanastos also testified EFG kept a million dollars that should have been paid to SCUSA, leaving EFG with an out-of-pocket loss of $5 million.

[6] The $14 million of program losses was projected by GPW in late 2016.

Pappanastos's testimony was corroborated by other evidence. It is undisputed the reserves ran out, and EFG paid $5 million in GAP claims out of pocket. SCUSA's head of operations, Lana Johnson, agreed EFG went "through all the reserve for the program." Similarly, SCUSA analyst Patricia Myers testified if reserves ran out EFG would have to pay claims at a loss. EFG's documentation and records showed EFG had realized losses of over $4 million on GAP contracts exceeding 125% LTV alone. Under this record, we conclude the evidence would readily enable a reasonable and fair-minded jury to award EFG $5 million and is, therefore, legally sufficient to support the judgment. *See United Rentals N. Am., Inc. v. Evans*, 668 S.W.3d 627, 640–41 (Tex. 2023).

But this does not end our analysis. SCUSA also contends there is no evidence SCUSA's breaches caused EFG's loss and, therefore, Pappanastos's testimony constitutes no evidence of damages. We disagree. The record is replete with testimony and documentary evidence supporting EFG's contention that SCUSA's breaches caused EFG's out-of-pocket damages.

For example, EFG contended below that SCUSA's refusal to agree to reasonable price increases breached the VSA, caused a massive deficit in the GAP program and its reserves, and caused EFG to pay $5 million in claims not covered by the depleted reserves. Section 4.2 of the VSA gave EFG the right to increase GAP policy prices on 120 days' notice if the increase was "mutually agreeable to" SCUSA. Section 15.1 required both EFG and SCUSA to "negotiate in good faith."

At trial, both sides' representatives testified that section 15.1's duty "to negotiate in good faith" applied to mutual agreements on price changes under section 4.2. GPW's actuarial analysis showed the GAP program would have had sufficient reserves to pay all claims had SCUSA accepted reasonable price increases and not breached section 4.2 of the VSA. Each of GPW's three actuarial analyses showed the GAP program needed to substantially increase prices to recoup losses from the previously inadequate pricing, break even within four years, and make the GAP program viable going forward. Bryan Miller, who was in charge of the GAP program at SCUSA, agreed that if SCUSA had agreed to GPW's November 2015 proposal, the S-Guard GAP program would have been viable and removed both parties' debts within two or three years.

EFG's actuarial expert, Grover Edie, testified SCUSA's failure to adopt GPW's proposed pricing was unreasonable and that the smaller price increase SCUSA agreed to in August 2016 ($13 increase rather than the recommended minimum increase of $121 per policy) was also unreasonable. It was Edie's opinion that SCUSA did not reasonably market the S-Guard GAP program and, as a result, SCUSA "essentially shut off the market – shut off the flow of contracts." Edie further explained the failure to increase prices combined with SCUSA's decision to cease marketing the S-Guard GAP program, removing all sales incentives for buyers, and implementing disciplinary action against buyers who continued to sell the program,

made the program "not viable." Edie told the jury that SCUSA's actions killed the program:

> By May, sales had dropped to almost nothing and turned negative after that. So we've got -- we've got no incentives. Now we not only have no new contracts being sold, we have the continued cancellations. And so you don't have any money going into the pot, but you have this draining of the fund that you hold for the claims and cancellations.

By that point, the program was "dead. It's not viable." From this evidence, a reasonable and fair-minded jury could readily conclude that but for SCUSA's breaches, EFG would have suffered no out-of-pocket losses. The evidence was, therefore, sufficient to support the damages awarded to EFG.

We need not address SCUSA's contention that the testimony of EFG's expert, Erica Bramer, constituted no evidence of the damages awarded because Pappanastos's testimony was sufficient to support the $5 million awarded to EFG as out-of-pocket damages.

Finally, SCUSA argues EFG's damages must be reduced by the amount of GAP claims EFG refused to pay after termination. SCUSA waived this claim by failing to object to the jury charge's failure to include a question or instruction on that basis. *E.g.*, *Khan v. Chai Rd., Inc.*, No. 05-16-00346-CV, 2017 WL 3015727, at *6 (Tex. App.—Dallas July 17, 2017, no pet.) (mem. op.); *see* TEX. R. CIV. P. 272, 274; *see also Equistar Chems., L.P.*, 240 S.W.3d at 868.

For these reasons, we overrule SCUSA's third issue.

IV. Remaining Issues

In its fourth and fifth issues, SCUSA does not substantively challenge the judgment. Rather, SCUSA addresses which claims should be remanded and which claims should be rendered in SCUSA's favor should this Court sustain any of its first three issues. Because we have overruled SCUSA's substantive issues and affirm the judgment, we do not reach SCUSA's fourth and fifth issues.

CONCLUSION

We conclude SCUSA's appellate issues have been waived or lack merit. Accordingly, we overrule SCUSA first, second, and third appellate issues, do not reach SCUSA's fourth and fifth appellate issues, and affirm the trial court's judgment.

/Robbie Partida-Kipness/
ROBBIE PARTIDA-KIPNESS
JUSTICE

230770F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

SANTANDER CONSUMER USA INC., Appellant

No. 05-23-00770-CV V.

ENTERPRISE FINANCIAL GROUP, INC., Appellee

On Appeal from the 193rd Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-18-08119.
Opinion delivered by Justice Partida-Kipness. Justices Goldstein and Miskel participating.

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

It is **ORDERED** that appellee ENTERPRISE FINANCIAL GROUP, INC. recover its costs of this appeal from appellant SANTANDER CONSUMER USA INC.

Judgment entered this 31st day of December 2024.