No. 18-1181

IN THE
SUPREME COURT OF TEXAS

EMERSON ELECTRIC CO., D/B/A FUSITE, AND EMERSON CLIMATE TECHNOLOGIES, INC., *Petitioners*,

V.

CLARENCE JOHNSON AND UNITED STATES LIABILITY CO., *Respondents*.

BRIEF OF AMICUS CURIAE THE NATIONAL ASSOCIATION OF MANUFACTURERS

IN SUPPORT OF REHEARING OF THE COURT'S JUDGMENT AFFIRMING A $15-MILLION PRODUCTS-LIABILITY AWARD ON THE BASIS OF A JURY-CHARGE WAIVER ISSUE NOT RAISED OR BRIEFED BY THE PARTIES

Pamela Stanton Baron
State Bar No. 01797100
ATTORNEY AT LAW
Post Office Box 5573
Austin, Texas 78763
512/479-8480
psbaron@baroncounsel.com

Counsel for Amicus Curiae The National Association of Manufacturers

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases **Page**

Appellate court orders

Secondary authorities

ARGUMENT OF AMICUS IN SUPPORT OF REHEARING

The National Association of Manufacturers previously submitted an amicus brief in this case at the petition stage urging the Court to: (1) revisit its decisions in *Turner* and *Acord* and hold that the jury in a design-defect case can be instructed on the five risk-utility balancing factors; and (2) reverse the court of appeals' unsupported expansion of the duty of a manufacturer to warn licensed professionals of known risks. The Court's opinion took a giant leap forward in freeing litigants and trial courts of *Turner* and *Acord*'s absolute prohibition against instructing the jury on the risk-utility factors in a design-defect case. But the opinion falters in failing to reach the merits of the warnings claim and in disposing of this case on a jury-charge waiver issue not raised or briefed by the parties or amici.

Amicus recognizes that this Court rarely grants rehearing. But when disposition of the case turns, as here, on an issue not raised or briefed by the parties, the Court should carefully examine the grounds for rehearing and be willing to reconsider whether its opinion is correct. Amicus urges the Court to grant rehearing, find that error was preserved, and reach the merits of the warnings claim.

Amicus regularly advocates to protect the due-process rights of its members in trial and appellate courts nationwide. Amicus has no direct financial interest in the outcome of this litigation. The fees for preparation of this brief will be paid by amicus.

I. The Court's opinion takes a giant leap forward in design-defect cases by freeing litigants and trial courts from the strictures of *Turner* and *Acord*.

In its earlier amicus brief, NAM urged this Court to revisit two prior decisions and hold that the jury in a design-defect case can be instructed on the five risk-utility balancing factors. In *Turner v. Gen. Motors Corp.*, 584 S.W.2d 844, 847 (Tex. 1979), the Court had rejected inclusion of an instruction on the risk-utility factors. In *Acord v. Gen. Motors Corp.*, 669 S.W.2d 111, 115-16 (Tex. 1984), that became an absolute prohibition: "in strict liability cases the jury is not to be instructed with balancing factors."

The Court's opinion in this case moves design-defect charge practice into the modern age by freeing litigants and trial courts from the strictures of *Turner* and *Acord*. The Court correctly held that the old absolute prohibition "does not reflect our current practice of allowing the trial court wide latitude to construct the charge" and "[w]e would not today conclude that including a legally correct instruction about the *Grinnell* factors was charge error." Op. at 16. The Court thus took a giant leap forward in instructing the jury in a design-defect case.

II. But the Court's opinion falters by affirming a $15-million judgment on a jury-charge waiver issue not raised or briefed by the parties or amici.

In its earlier amicus brief, NAM also urged the Court to reverse the court of appeals' unsupported expansion of the duty of a manufacturer to warn licensed professionals of known risks. The Court did not reach the merits of the warnings

claim. Instead, the Court held that Emerson had waived error by failing to lodge an objection to the proportionate-responsibility question in addition to its no-evidence objection and instructed verdict complaining of submission of the warnings claim. Op. at 19-20.

The Court announced this disposition even though the waiver issue had never been raised or briefed by the parties – parties who are represented by some of the State's leading appellate and trial attorneys. This was erroneous and merits rehearing for two reasons: (1) the Court should have requested supplemental briefing on the unraised waiver issue prior to disposition; and (2) without the benefit of supplemental briefing, the Court failed to correctly consider the law, the record, and the policies underlying charge-objection practice. Rehearing is merited under these extraordinary circumstances.

A. Appellate courts should request supplemental briefing before disposing of a case on an issue not raised or briefed by the parties.

For decades, the bar, the bench, and scholarly commentators have debated whether appellate courts should decide issues not raised by the parties and, if so, in what limited circumstances that should occur. *See, e.g.,* Allan D. Vestal, *Sua Sponte Considerations in Appellate Review*, 27 FORDHAM L. REV. 477, 477-512 (1958); Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245, 262-94 (2002) ("Milani & Smith"); Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive*

Litigants of an Opportunity to Be Heard, 39 SAN DIEGO L. REV. 1253, 1280-86 (2002) ("Miller"). The U.S. Supreme Court has held that federal appellate courts have discretion to decide issues *sua sponte* and are justified in doing so where "the proper resolution is beyond any doubt or where 'injustice might otherwise result.'" *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (citations omitted). Some state courts, on the other hand, have held that appellate courts may not reach issues not raised by the parties. *See, e.g., Steiner v. Markel*, 968 A.2d 1253, 1257 (Pa. 2009).

This debate will continue to rage on. But all sides agree on one thing: When a court identifies a new issue, it should give the parties an opportunity to be heard through supplemental briefing or argument.

1. This Court and other appellate courts routinely request supplemental briefing on new issues.

It has long been this Court's practice to request supplemental briefing when addressing new issues or new cases that the parties have not briefed. *See, e.g.*, *Luciano v. SprayFoamPolymers.com, LLC*, No. 18-0350 (Tex. Mar. 31, 2021) (letter requesting supplemental briefs addressing recent U.S. Supreme Court decision); *In re Panda Pwr. Infrastructure Fund, LLC*, No. 18-0792 (Tex. Oct. 16, 2020) (letter requesting supplemental briefing on mootness and adequacy of appellate remedy); *In re Union Carbide Corp.*, No. 04-1120 (Tex. Sept. 27, 2005) (requesting supplemental briefs on effect of new legislation).

The practice is uniform among appellate courts. The U.S. Supreme Court has endorsed supplemental briefing as a preferred procedure, *Trest v. Cain*, 522 U.S. 87, 92 (1997), and routinely requests supplemental briefing. *See, e.g., Frank v. Gaos*, No. 17-961 (U.S. Nov. 6, 2018) (order directing supplemental briefing on standing); *Jennings v. Rodriguez*, 15-1204 (U.S. Dec. 15, 2016) (order directing supplemental briefing on constitutionality of certain immigration laws); *Citizens United v. Fed. Elec. Comm'n*, No. 08-205 (U.S. June 29, 2009) (order setting the case for re-argument and directing supplemental briefing on whether the Court should overrule precedent). Intermediate federal appellate courts do likewise. Ruth Bader Ginsburg, *The Obligation to Reason Why*, 37 U. FLA. L. REV. 205, 215 (1985) ("If the panel or the opinion writer spots a potentially dispositive question not raised by the parties, the judges generally invite supplemental briefs, thereby affording the litigants a chance to have their say."). Courts in other states "strongly favor or overtly mandate" a supplemental briefing procedure. Ronald J. Offenkrantz & Aaron S. Lichter, *Sua Sponte Actions in the Appellate Courts: The "Gorilla Rule" Revisited*, 17 J. APP. PRAC. & PROCESS 113, 124 & n. 64 (2016) ("Offenkrantz & Lichter").

2. Supplemental briefing provides guidance to the Court on the law and the record and helps the Court avoid mistakes.

The adversary system in which a court receives competing arguments from both sides is "the best means of ascertaining truth and minimizing the risk of error." *Mackie v. Montrym*, 443 U.S. 1, 13 (1976). In most cases, briefing will sharpen the

issues and underlying policies and lead to better decisions. This is particularly true when the issue is not one of pure law, but turns on the facts and the record of the particular case, which the parties will know better than the court. Appellate courts acting *sua sponte* "invite error because the issue has not been fleshed out fully; it has not been researched, briefed, or argued by the parties." *Turner v. Flournoy*, 594 S.E.2d 359, 362 (Ga. 2004). Without the benefit of the litigants' views, the court "has a higher probability of reaching an erroneous result." Offenkrantz & Lichter, 17 J. APP. PRAC. & PROCESS at 133, citing Miller, 39 SAN DIEGO L. REV. at 1290.

3. Surprise issues and decisions erode trust in the judicial system.

Fundamental to maintaining respect for and trust in the judicial system is the belief that decisions are reached fairly and impartially. Surprise decisions turning on issues not raised or briefed by the parties erode that respect and trust. *Mapp v. Ohio*, 367 U.S. 643, 677 (1961) (Harlan, J., dissenting) (deciding issues *sua sponte* without input from the parties "is not likely to promote respect either for the Court's adjudicatory process or for the stability of its decisions"). As the Georgia Supreme Court has recognized, decisions based on unbriefed issues are fundamentally not fair:

> [T]he parties are blind-sided when an appellate courts reaches an issue on its own motions. They have no inkling that the court even thought about such an issue until they receive and read the court's opinion. That is not fair.

Turner v. Flournoy, 594 S.E.2d at 362. Bedrock values of the judicial system are undercut by surprise dispositions on unbriefed issues. E. King Poor & James E. Goldschmidt, *But No One Argued That: Sua Sponte Decisions on Appeal*, 57 No. 10 DRI FOR THE DEFENSE 62, 63 (Oct. 2015) (The core "principles of stability and finality are best served when parties can rely on the assumption that they will not be surprised at the end of a case by new issues that neither side has raised.").

Worse, surprise decisions on an unbriefed issue can give rise to a perception of judicial activism, bias, or result-oriented decision-making. *Id.* at 64, 65; Milani & Smith, 69 TENN. L. REV. at 280-83.

4. Supplemental briefing ensures due process.

Disposition of an appeal on an issue not raised or briefed by the parties raises due process concerns. Miller, 39 SAN DIEGO L. REV. at 1288-96; Milani & Smith, 69 TENN. L. REV. at 262-71. Appellate courts acting *sua sponte* "contravene due process protections . . . because in doing so they can deprive a party of life, liberty, or property without giving notice or allowing a meaningful opportunity to be heard on the dispositive issues." Offenkrantz & Lichter, 17 J. APP. PRAC. & PROCESS at 132. Fundamental to our appellate system is the opportunity to be heard: "Because there are serious procedural due process concerns when a court raises and decides issues sua sponte, the parties must receive notice and an opportunity for comment when it occurs." *Id.* at 135. Requesting supplemental briefing is the widely-

recognized method for safeguarding the parties' due process rights when appellate courts encounter new issues. *Id.* at 136.

Requesting supplemental briefing not only ensures due process for the litigants, it also provides the opportunity for others affected by or interested in the issue to weigh in through amicus submissions. Here, had the Court requested supplemental briefing, NAM and other amici would have had the opportunity to submit additional briefing addressing the issue.

5. Supplemental briefing is efficient.

Amicus recognizes that this Court has a strong interest in avoiding delay in issuing opinion after argument and in clearing its docket before term-end. Requesting supplemental briefing when the opinion author encounters a new issue should not delay disposition because the Court can – and does – set strict time limits on supplemental filings to ensure a timely disposition. *Luciano*, No. 18-0350 (14 days to file supplemental briefs); *In re Panda Pwr. Infrastructure Fund, LLC*, No. 18-0792 (17 days). Moreover, input from the parties should expedite resolution of the new issue by identifying the key cases and policies as well as providing the Court with a road map to relevant parts of the record.

B. Here, a lack of supplemental briefing resulted in an erroneous decision on a waiver issue not raised or briefed by the parties.

Likely because there was no supplemental briefing from the parties, the Court incorrectly decided the newly-raised waiver issue. The opinion omits relevant

authorities, misreads the record, and fails to analyze the underlying policies governing charge-objection practice. As shown below, the Court should grant rehearing, hold that error was preserved, and reach the merits of the warnings claim.

1. The Court's opinion fails to cite, discuss, or distinguish contrary precedent and commentary.

In two paragraphs, the Court's opinion addresses whether a defendant who raises a no-evidence challenge to one ground of liability must also object to a proportionate-responsibility question that includes that and other liability grounds in order to show harmful error under *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 389 (Tex. 2000). The Court left that question unanswered in *Romero v. KPH Consolidation, Inc.*, 166 S.W.3d 212, 229 (Tex. 2005). Although Johnson never asserted waiver under *Romero*, the Court nonetheless concluded that Emerson had waived its right to challenge the warning claim because of a failure to object to the proportionate-responsibility questions. Op. at 20.

Sixteen years have passed since *Romero*, and intermediate courts and top Texas appellate practitioners have concluded that a separate objection is not required. These authorities – not cited, discussed, or distinguished in the Court's opinion – uniformly recognize that "if a party objects that a particular theory . . . should not be submitted at all, then the party need not make an additional objection to the way in which the objectionable material was presented in the jury charge." Tracy Christopher & Jennifer Bruch Hogan, *Jury Charge*, State Bar of Texas, CIV.

APP. PRAC. 101 at 10 (2012). In other words, the defendant need only object to the rotten apple, not the lingering smell affecting downstream issues in the charge.

The Court's opinion fails to cite authorities that hold or state that a separate objection is not required:

- *Mo. Pac. R.R. Co. v. Limmer*, 180 S.W.3d 803, 823 (Tex. App.—Houston [14th Dist.] 2005), *rev'd on other grounds*, 299 S.W.3d 78 (Tex. 2009): "[W]e conclude that Union Pacific did not have to object to the apportionment question to be entitled to a *Casteel* harm analysis, if we determine that [one of the two liability theories] cannot be an independent basis of liability."

- *Schrock v. Sisco*, 229 S.W.3d 392, 395 (Tex. App.—Eastland 2007, no pet.): The court adopts the *Limmer* analysis and holds that an objection to the submission of an invalid theory of recovery is sufficient to preserve error for purpose of conducting a *Casteel* harmful-error analysis of an exemplary damages question combining multiple theories of liability.

- *McFarland v. Boisseau*, 365 S.W.3d 449, 454-55 (Tex. App.—Houston [1st Dist.] 2011, no pet.): "Both the Fourteenth and Eleventh Courts of Appeals concluded that, once a party objects to the inclusion of invalid bases for liability in the charge, this objection also preserves error for any impact the wrongful inclusion has on other charge questions. That is, an objection to the form of all other impacted questions is not necessary to preserve the issue for appeal. We adopt the holding of these courts." (Citations omitted.)

- David Keltner & Mary H. Smith, *Harmless Error—Really?*, State Bar of Texas, ADV. CIV. APP. PRAC. COURSE at 12 (2012): "[A] party may validly rely on these holdings [in *Limmer*, *Schrock*, and *McFarland*] as the rule regarding error preservation in matters involving *Casteel*'s presumed harm analysis."

- Tracy Christopher & Jennifer Bruch Hogan, *Jury Charge* at 10: "[I]f a party objects that a particular theory . . . should not be submitted at all, then the party need not make an additional objection to the way in which the objectionable material was presented in the jury charge."

Had the Court requested supplemental briefing, it would have had the benefit of these authorities and the parties' analysis prior to issuing its opinion. As it stands now, however, these highly relevant authorities are not cited or discussed but are nonetheless disapproved *sub silentio*.

2. The Court's opinion misreads the record.

Absent supplemental briefing and guidance from the parties, the Court's opinion fails to fully comprehend the record. As Emerson points out in its rehearing motion, pre-charge conference drafts and objections do not preserve error. *Cruz v. Andrews Restoration Inc.*, 364 S.W.3d 817, 831 (Tex. 2012).

More to the point, though, and contrary to the Court's opinion, Emerson's early objection to an early pre-trial draft of the charge: (1) was directed to a proportionate-responsibility question that erroneously submitted Emerson twice, 6.CR.2313; (2) explicitly noted that it was not a formal objection and reserved the right to formally object, 6.CR.2476 n.1; (3) was treated by the trial court as not a formal or even actionable objection, 11.RR.122; and (4) consequently was never ruled on, *id.*

With the benefit of supplemental briefing from the parties, the Court would have been aware of the full record and could not have reached the conclusion that Emerson's early actions amounted to waiver.

3. The Court's opinion confuses error preservation with whether the error is harmful.

The Court's opinion confuses error preservation at trial with the harm analysis undertaken by the appellate court. Error preservation requires a party to object to the form of a jury question. Emerson preserved its objections to the warnings question and made clear to the trial court that the warnings claim should not be submitted.

Emerson did not need to object to the proportionate-responsibility question because there was nothing wrong with the form of that question. There was no error for the trial court to correct. As this Court recognized in *Romero*, defendant's "objection to the malicious credentialing question was correct, and had the trial court sustained it, there would have been no problem with the apportionment question." *Romero*, 166 S.W.3d at 229. The same is true here.

The later apportionment question in the charge is merely a manifestation of the harm from overruling the objection to submission of the warnings claim. It gives rise to a basis for reversal, but is not itself the source of the error. Only the erroneous question – the source of the error – requires objection.

Determining whether preserved charge error is harmful is an entirely different matter. Harm analysis under *Casteel* is not undertaken to identify error. It determines whether error previously identified is harmful enough to require reversal. This Court recognized that distinction in *Thota v. Young*, 366 S.W.3d 678, 689-90

(Tex. 2012), and concluded that a substantive objection suffices to preserve both the substantive error and a *Casteel* harm analysis. In other words, a party need only object to the substantive error and not to manifestations of the harm that results from that error in other parts of the charge.

Of course, a party can always ask the trial court to include multiple proportionate-responsibility questions in the charge. That might make the appellate court's job easier if there is a rotten apple among the liability theories, and it might also avoid a new trial. But that is a question of administration, not error preservation.

Because Emerson objected to submission of the warnings claim, it preserved error and is entitled to a *Casteel* harm analysis.

CONCLUSION AND PRAYER

Amicus The National Association of Manufacturers urges the Court to grant rehearing, find that error was preserved, and reach the merits of the warnings claim.

Respectfully submitted,

/s/ Pamela Stanton Baron

Pamela Stanton Baron
State Bar No. 01797100
ATTORNEY AT LAW
Post Office Box 5573
Austin, Texas 78763
512/479-8480
psbaron@baroncounsel.com

Counsel for Amicus Curiae
The National Association of Manufacturers

CERTIFICATE OF COMPLIANCE

I certify that: (1) the word count of this document is 3,197 words according to Microsoft Word 2010 and excluding those parts of the document specified in TEX. R. APP. P. 9.4(i)(1); and (2) this document has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes.

/s/ Pamela Stanton Baron

_____

Pamela Stanton Baron

CERTIFICATE OF SERVICE

I certify that, on June 9, 2021, I served a copy of this brief by e-service on the following:

David M. Gunn
Erin H. Huber
BECK REDDEN LLP
1221 McKinney, Suite 4500
Houston, TX 77010

Jeffrey S. Levinger
J. Carl Cecere
LEVINGER PC
1700 Pacific Ave., Suite 2390
Dallas, TX 75201

Andrew L. Payne
Shannon Turner Hays
PAYNE MITCHELL LAW GROUP
3500 Maple Avenue, Suite 1250
Dallas, TX 75219

Jeffrey S. Reddall
LAW OFFICE OF JEFFREY S. RENDALL
Comerica Bank Building, Suite 925
One Sugar Creek Center Blvd.
Sugar Land, TX 77478

Adam K. Peck
Melody H. Eagan
LIGHTFOOT, FRANKLIN & WHITE, L.L.C.
400 20th Street
North Birmingham, AL 35203

/s/ Pamela Stanton Baron

_____

Pamela Stanton Baron

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below:

Pamela Baron on behalf of Pamela Baron
Bar No. 01797100
psbaron@baroncounsel.com
Envelope ID: 54253978
Status as of 6/9/2021 1:52 PM CST

Associated Case Party: Clarence Johnson

Name	BarNumber	Email	TimestampSubmitted	Status
Andrew LPayne		andy@paynemitchell.com	6/9/2021 1:45:52 PM	SENT
Michelle Fant		michelle@paynemitchell.com	6/9/2021 1:45:52 PM	SENT
Stefanie DBradshaw		Stefanie@paynemitchell.com	6/9/2021 1:45:52 PM	SENT
Jeffrey S. Levinger	12258300	jlevinger@levingerpc.com	6/9/2021 1:45:52 PM	SENT
Joseph Cecere	24050397	ccecere@cecerepc.com	6/9/2021 1:45:52 PM	SENT
Todd HRamsey		todd@paynemitchell.com	6/9/2021 1:45:52 PM	SENT
Larry E.Cotton		lcotton@cottenschmidt.com	6/9/2021 1:45:52 PM	ERROR
Ethan L.Shaw		elshaw@shawcowart.com	6/9/2021 1:45:52 PM	SENT
Matthew J.Riley		mjriley@shawcowart.com	6/9/2021 1:45:52 PM	SENT
Shannon Hays		shannon@paynemitchell.com	6/9/2021 1:45:52 PM	SENT

Associated Case Party: Emerson Electric Co. d/b/a Fusite

Name	BarNumber	Email	TimestampSubmitted	Status
Erin H.Huber		ehuber@beckredden.com	6/9/2021 1:45:52 PM	SENT
David M.Gunn		dgunn@beckredden.com	6/9/2021 1:45:52 PM	SENT
Melody H.Eagan		meagan@lightfootlaw.com	6/9/2021 1:45:52 PM	SENT
Adam K.Peck		apeck@lightfootlaw.com	6/9/2021 1:45:52 PM	SENT

Associated Case Party: Texas Association of Defense Counsel

Name	BarNumber	Email	TimestampSubmitted	Status
Richard B.Phillips, Jr.		rich.phillips@tklaw.com	6/9/2021 1:45:52 PM	SENT

Case Contacts

Automated Certificate of eService

This automated certificate of service was created by the efiling system.
The filer served this document via email generated by the efiling system
on the date and to the persons listed below:

Pamela Baron on behalf of Pamela Baron
Bar No. 01797100
psbaron@baroncounsel.com
Envelope ID: 54253978
Status as of 6/9/2021 1:52 PM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Roger Wade Hughes	10229500	rhughes@adamsgraham.com	6/9/2021 1:45:52 PM	SENT
Richard Barrett Phillips	24032833	Rich.Phillips@tklaw.com	6/9/2021 1:45:52 PM	SENT
Melissa Davis	24045756	Melissa.Davis@tklaw.com	6/9/2021 1:45:52 PM	SENT
James Hines		jhines@txbiz.org	6/9/2021 1:45:52 PM	SENT
William Worthington		wworthington@ewingjones.com	6/9/2021 1:45:52 PM	SENT
Deborah Stanfield		assistant@levingerpc.com	6/9/2021 1:45:52 PM	SENT

Associated Case Party: United States Liability Insurance Company

Name	BarNumber	Email	TimestampSubmitted	Status
Jeffrey S. Reddall	16659200	jeff@reddall-law.com	6/9/2021 1:45:52 PM	SENT

Associated Case Party: The National Association of Manufacturers

Name	BarNumber	Email	TimestampSubmitted	Status
Pamela Stanton Baron	1797100	psbaron@baroncounsel.com	6/9/2021 1:45:52 PM	SENT