CASE NO. 01-16-0443-CV

IN THE FIRST COURT OF APPEALS
HOUSTON, TEXAS

MANHATTAN | VAUGHN, JVP,
***Appellant*,**
v.

JOSEFINA GARCIA, INDIVIDUALLY AND AS HEIR TO THE ESTATE OF ANGEL GARCIA; and ORBELINDA HERRERA, AS NEXT FRIEND OF A.G. AND B.G. (MINORS),
Appellees.

On Appeal from the 80th Judicial District Court of Harris County, Texas,
Cause No. 2013-76550; Hon. Larry Weiman Presiding

Brief of Amici Curiae Texas Building Branch of the Associated General Contractors of America, Associated Builders and Contractors of Texas, TEXO – The Construction Association, Associated General Contractors – Houston Chapter, American Subcontractors Association, Inc., Higginbotham Insurance and American Contractors Insurance Company Risk Retention Group in support of Manhattan | Vaughn, Appellant

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BRIEF OF AMICI CURIAE

Amici Curiae Texas Building Branch of the Associated General Contractors of America, Associated Builders and Contractors of Texas, TEXO – The Construction Association, Associated General Contractors – Houston Chapter, American Subcontractors Association, Inc., ASA of Texas, Inc., Higginbotham Insurance and American Contractors Insurance Company Risk Retention Group (collectively "Amici Curiae") submit this brief in support of Appellant Manhattan | Vaughn, JVP ("Manhattan | Vaughn").

STATEMENT OF INTEREST OF AMICI CURIAE

This Amici Curiae Brief is presented by the state and local chapters of the largest construction trade associations in the United States, together with a cross-section of construction insurance businesses in the State of Texas. The primary purpose of this brief is to underscore the importance of the issue on appeal – the preservation of the exclusive remedy under controlled insurance programs ("CIPs") – to construction owners, contractors, subcontractors, brokers, and insurers alike.[1]

[1] For the sake of simplicity, this brief refers to coverage under an "OCIP," which is one type of controlled insurance program or CIP where the owner sponsors and procures the insurance for the project. Another frequently encountered and popular type of CIP is a "CCIP," or a "Contractor Controlled Insurance Program." In that type of program, the contractor, rather than the owner, sponsors and procures the coverage. For all intents and purposes, there is little difference between the two types of CIPs in terms of the extension of the exclusive remedy throughout the tiers of a construction project.

The Texas Building Branch of the Associated General Contractors of America ("TBB – AGC") is a branch of AGC of America. TBB – AGC encompasses eleven AGC building chapters located throughout Texas. The membership of these eleven chapters consists of approximately 370 general contractors and 3,890 specialty contractors, subcontractors, and suppliers, all doing business in Texas.

Associated Builders and Contractors of Texas is a state-wide trade association consisting of seven local ABC chapters in Texas made up of over 1,700 members representing merit shop contractors who strongly subscribe to free enterprise principles. Those chapters include Greater Houston, Texas Gulf Coast (Freeport), Texas Mid Coast (Victoria), Texas Coastal Bend (Corpus Christi), South Texas (San Antonio), Central Texas (Austin), and TEXO (Dallas – Fort Worth and East Texas).

TEXO – The Construction Association ("TEXO") is the largest commercial contractors association in Texas and is affiliated with the national organizations Associated Builders and Contractors, Inc. (ABC) and AGC of America. With over 1,900 members in north and east Texas, TEXO provides innovative programs, quality services, and strategic alliances focusing on governmental representation, safety, health, and environmental issues, craft workforce development, professional training, and community networking events.

Associated General Contractors – Houston Chapter is the local chapter of AGC of America serving over 500 Houston-area members.

The American Subcontractors Association ("ASA") is a national organization of construction trade contractors. Founded in 1966, ASA leads and amplifies the voice of trade contractors to improve the business environment in the construction industry and to serve as stewards for the community. ASA dedicates itself to improving the business environment in the construction industry, with an emphasis on ethical and equitable business practices, quality construction, membership diversity, integrity, and a safe and healthy work environment. ASA has 2,155 members nationwide, including over 500 members from five Texas chapters in Houston, North Texas, San Antonio, the Rio Grande Valley, and statewide.

Higginbotham Insurance ("Higginbotham") is the largest privately held insurance brokerage firm in Texas. Higginbotham provides insurance and financial services to its clients, including Texas owners, contractors, subcontractors, and other entities in the construction industry. One of its main concerns is protection of its clients from the many risks associated with construction, including job site injuries. For that reason, Higginbotham is active in providing workers compensation insurance and general liability insurance coverage, as well as loss control services to its insured entities. In doing so,

Higginbotham analyzes, administers, and places CIPs on behalf of its clients in order to further its goal of protecting its construction clients.

American Contractors Insurance Company Risk Retention Group ("ACIG") is a Texas corporation. American Contractors Insurance Group Ltd., a Bermuda corporation, is the parent company of ACIG, which writes CGL coverage for the members of the ACIG risk retention group, organized under the Federal Risk Retention Act. ACIG has been in existence and headquartered in Dallas, Texas, since 1981. Its member shareholders include forty general, industrial, and highway contractors throughout the United States, including four that are headquartered within the State of Texas. JT Vaughn Construction, one of the members of the Manhattan | Vaughn JVP, is a member of ACIG, although ACIG did not place any coverage on the Kyle Field project. Numerous ACIG members, in addition to JT Vaughn, construct projects in Texas, and many of the members also sponsor Contractor Controlled Insurance Programs ("CCIPs") written by and administered by ACIG, as well as participate in projects as enrollees in OCIPs.

Because of the unique perspectives as influential representatives and participants in broad segments of the construction industry, Amici Curiae have a substantial interest in the many risks that are inherent in the construction process. Workers compensation insurance has long played an important role for the industry in managing those risks. Whether Amici Curiae and the members or insureds that

they represent can depend on the workers compensation policies and Texas laws to provide protection against financial harm is a matter of continuing and urgent interest to all of the Amici Curiae. Consequently, though they are not parties to this appeal, this brief was filed by Amici Curiae through the undersigned independent counsel, who was paid a fee by them for its preparation.

ISSUE PRESENTED

> The Texas Supreme Court has confirmed that the inclusion of workers compensation within an OCIP constitutes a written agreement under which the general contractor provides workers compensation coverage within the meaning of Texas Labor Code § 406.123, entitling all tiers of contractors and subcontractors in an OCIP to the exclusive remedy protection. Under settled Texas case law, including *Valadez v. MEMC Pasadena, Inc.*, is it the provision of coverage, and not the responsibility in the event of its absence, that supports the exclusivity defense under an OCIP?

INTRODUCTION

As designed, the Texas Workers Compensation Act ("Act") strikes a balance that provides predictability to employers and employees alike. The Act provides injured workers with certainty of recovery regardless of fault and without the time and expense of litigation. At the same time, the Act provides subscribing employers with certainty through the exclusive remedy rule, which bars tort actions by injured workers against their employers. It cannot be gainsaid that the death of Angel Garcia was a terrible and heart-rending occurrence. But the mechanism contemplated in the Act performed flawlessly, and Mr. Garcia's family

received their statutory benefits in exchange for giving up the right to sue their employer. They were not left without a remedy.

But for employers on a construction jobsite, the certainty afforded the Garcias in this instance can be hard to come by, as demonstrated by this appeal. While the exclusive remedy prevents injured workers from suing their own employers, it does not prevent actions against third parties. A construction project is organized into "tiers," the uppermost tier being the owner, with lower tiers from the general contractor, subcontractors, and any sub-subcontractors proceeding "downstream." Construction is a risky and dangerous endeavor, and due to these multiple tiers working in close proximity, a construction project is ripe for third party claims. These claims target third parties, i.e., other parties working on the project, as an avenue of recovery in excess of workers compensation benefits. Unfortunately, there is little regard for their actual responsibility for the accident. The result is that the exclusive remedy, designed to bar expensive and unpredictable litigation as the employer's consideration in the workers compensation *quid pro quo*, can instead encourage litigation against third parties with little or no connection to the accident.

Without belittling the seriousness of job site injuries, let alone unfortunate and heartbreaking deaths such as that of Angel Garcia, third party actions are often expensive and time-consuming for the construction industry, diverting a

contractor's principals from efficiently operating its business and constructing projects for the good of society. In an effort to obtain some protection from third party actions, particularly those that bear little relationship to actual liability, upper-tier owners and general contractors began to demand contractual indemnification from lower-tier subcontractors for workplace injuries to their own employees. Since 1963, the Act permits this practice – allowing a subscribing employer to agree in writing, prior to an injury, to indemnify a third party for an injury to its own employee.[2] While this mechanism may provide a level of protection to indemnified parties, it gives rise to another problem – the "third party over action." This is a type of third party action in which an injured worker who has already received workers compensation benefits pursues a negligence claim against an owner or contractor whom the injured worker's employer has indemnified. Thus, the liability flows back to the injured worker's employer through the contractual indemnity provision.

Chief Justice Hecht recognized this issue in his concurring opinion in *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433 (Tex. 2009), a seminal Texas Supreme Court case on the application of the exclusive remedy in OCIPs.

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[2] Act of May 20, 1963, 58th Leg., R.S., ch. 437, § 1, 1963 Tex. Gen. Laws 1132, now Tex. Lab. Code § 417.004 ("In an action for damages brought by an injured employee, . . . the employer is not liable to the third party for reimbursement or damages based on the judgment or settlement unless the employer executed, before the injury or death occurred, a written agreement with the third party to assume the liability.").

As he pointed out, through the availability of third party over actions, subscribing employers find themselves footing the bill for negligence actions by their own employees, thus violating the most fundamental protection that the Act seeks to afford. As Justice Hecht observed:

> In this situation the workers' compensation system provides nothing to any employer, even though all employers have agreed to provide compensation benefits to all employees, which the injured worker himself requested and received.

Id. at 454.

The Texas Legislature moved to address this paradoxical and unintended consequence of the Act thirty-four years ago. Section 406.123 of the Texas Labor Code permits a general contractor and a subcontractor (as those terms are defined in the Act) to enter into a written agreement under which the general contractor provides workers compensation insurance to the subcontractor and its employees.[3] Doing so makes the general contractor the employer of the subcontractor and the subcontractor's employees for purposes of the workers compensation laws. As a result, the general contractor then receives tort immunity against claims by the subcontractor and its employees.

Thus, a two-pronged solution to the problem of third party over actions has emerged: (1) parties protect themselves by requiring other tiers on site to provide

[3] The Texas Legislature first added the "written agreement" provision, now codified in § 406.123 of the Act, in 1983. *See Entergy*, 282 S.W.3d at 438-39 (citing Act of May 28, 1983, 68th Leg., R.S., ch. 950, § 1, sec. 6, 1983 Tex. Gen. Laws 5210, 5210-11).

indemnity for injuries to their own employees; and (2) through the extension of the exclusive remedy rule in § 406.123, parties prevent tort liability from flowing back to the employer by entering into a written agreement for the general contractor to provide workers compensation insurance. One such type of written agreement is a construction contract or subcontract that provides for an owner controlled insurance program, or OCIP, which allows the site owner to insure all tiers of contractors and subcontractors on a construction project within a single program of insurance. This is the type of program that Texas A&M had in place on the Kyle Field project.

In 2012, the Texas Legislature recognized the validity of this two-pronged approach. Chapter 151, "Consolidated Insurance Programs," of the Texas Insurance Code provides that a construction contract may require a party to enroll in a consolidated insurance program ("CIP") such as the Texas A&M OCIP (subject to disclosure requirements added in the 2015 revisions to the statute). *See* Tex. Ins. Code Ann. § 151.003 (West). In this same chapter, the Legislature retained the initial contractual solution to the problem of third party actions. Specifically, §151.102 in Subchapter C of Chapter 151 (commonly referred to as the Texas Anti-Indemnity Act) generally forbids indemnification for a party's own negligence. It makes an exception, however, for employee claims:

> Section 151.102 does not apply to a provision in a construction contract that requires a person to indemnify, hold harmless, or defend

another party to the construction contract or a third party against a claim for the bodily injury or death of an employee of the indemnitor, its agent, or its subcontractor of any tier.

Tex. Ins. Code § 151.103.

Because not all job sites can or will be covered through a CIP, the "employee exception" in § 151.103 preserves the ability to require contractual protection against third party actions, including the typical third party over action where only the negligence of the upper tier is alleged because negligence of the employer is barred by the exclusive remedy. But, by recognizing and approving CIPs, that is, insurance programs in which an upper tier provides compensation coverage to all employees on the project site through the CIP, Texas appellate courts have universally upheld a CIP as a means whereby an upper tier owner, such as Texas A&M, provides workers compensation to employees of a lower tier, such as Manhattan | Vaughn and its subcontractors. The result is that a CIP provides protection for all of the employees on the job site through workers compensation insurance for employee injuries, and at the same time, all parties on the job site are also protected by the exclusive remedy protection conferred under § 406.123 of the Act. By providing workers compensation protection for all workers on the jobsite, a CIP is a perfect vehicle by which to advance to public policy of Texas, i.e., to extend workers compensation insurance to as many workers as possible.

The arguments advanced by the Garcias seek to chip away at the public policy considerations behind exclusive remedy protection and re-open the door to third party over actions against other contractors or the owner of the job site. But as set out below, § 406.123 as written has broad application, including in the CIP context, and accordingly, Texas courts have consistently interpreted it broadly.

SUMMARY OF THE ARGUMENT

There is a remarkably large body of case law addressing the scope and application of § 406.123 and its statutory predecessors. Courts have addressed: (1) what it means to "provide" workers compensation; (2) who is a general contractor within the meaning of the statute; and (3) whether, because all subscribing subcontractors are deemed co-employees of the general contractor, the exclusive remedy extends throughout all tiers of contractors on a project. In every single instance, including several cases addressing OCIPs specifically, Texas courts have favored broad application of the exclusive remedy provision.

This judicial unanimity makes sense. Interpreting § 406.123 broadly comports with the statute and allows the Act to fix the problems it was designed to solve, fostering the overall balance struck by the Act. Because it protects employers through the extension of the exclusive remedy, it also incentivizes the use of OCIPs or similar written agreements to provide workers compensation. In turn, reliance upon an OCIP, where the owner purchases the workers compensation

coverage, benefits participating subcontractors and their employees. Due to the size of the owner, economies of scale, and amount of premium, the coverage is more likely to be obtained and remain in force, making it more likely that injured employees will receive their workers compensation benefits. In fact, providing workers compensation coverage through an OCIP may actually allow a greater number of subcontractors to bid and obtain jobs in the event that such subcontractors may not be able to provide workers compensation coverage to their employees on their own. Moreover, it increases the likelihood that once the workers compensation coverage is in place through an OCIP, it will be maintained throughout the length of the project and might not be allowed to lapse by a financially strapped employer.

In contrast to the interpretation by Texas appellate courts, the Garcias' proposed interpretation of § 406.123 (and presumably the interpretation that the trial court erroneously accepted) is contrary to the purpose and plain language of the Act. Amici Curiae do not intend to revisit the arguments addressed by Manhattan | Vaughn in its opening and reply briefs. However, if accepted, the Garcias' overall interpretation of § 406.123 will have significant and negative ramifications for the construction industry at large.

The Garcias misread the Texas Supreme Court's decision in *HCBeck* in two critical ways. First, the Garcias miss an important distinction between simply

requiring a subcontractor to provide workers compensation insurance and requiring a subcontractor to enroll in an OCIP. Merely requiring a subcontractor to buy workers compensation insurance does not meet § 406.123's requirements and was not at issue in *HCBeck*. On the other hand, requiring a subcontractor to enroll in an established OCIP does comply with § 406.123, which was precisely the issue and holding in *HCBeck*.

The Garcias also seek to wring out of *HCBeck* an "ultimate responsibility" requirement that simply does not exist. *HCBeck* unmistakably holds that a written agreement that "requires *only* that the subcontractor enroll" in an OCIP does, in fact, provide workers compensation as contemplated by § 406.123. This makes sense because by its terms, § 406.123 requires only that coverage be provided, i.e., that there is coverage in place, and that it be provided by a general contractor pursuant to a written agreement. It is neither the proper role nor the ordinary practice of the Texas Supreme Court to supplement or amend statutes that the Legislature drafted and passed. Yet the Garcias now argue that *HCBeck* did precisely that by adding a requirement (not contained within the statutory language) that a general contractor accept "ultimate responsibility" for ensuring workers compensation remains in place in the event the OCIP is terminated. Manhattan | Vaughn thoroughly rebutted this argument in its reply brief, quoting

Valadez, where this Court flatly rejected the argument that the Garcias now make. But the quote is so on-point and so unequivocal that it bears repeating:

> It is the provision of coverage, ***not the responsibility in the event of its absence***, that supports the exclusivity defense. (emphasis added).

Valadez v. MEMC Pasadena, Inc., No. 01–09–00778–CV, 2011 WL 743099, at *6 (Tex. App.—Houston [1st Dist.] Mar. 3, 2011, no pet.).

So that is the law. It is not particularly murky or complicated. The Act confers statutory employer status based on the ***actual provision*** of workers compensation insurance, not based on ultimate responsibility. Under *HCBeck*, a general contractor "provides" workers compensation insurance by requiring the subcontractor to enroll in an OCIP. That actual provision of coverage – and nothing more – entitles the general contractor to exclusive remedy protection. There is no novel legal issue to be decided here, nor is there a critical distinguishing fact from the large body of case law from which these two principles flow.

Even if the Garcias are right and *HCBeck* did add an ultimate responsibility requirement to the statute, the statute is broad enough to provide an alternate avenue to exclusive remedy protection for Manhattan | Vaughn. The Texas Supreme Court has held that the Act's definition of general contractor is broad enough to encompass an owner such as Texas A&M, who seeks to procure work through a contractor such as Manhattan | Vaughn. Thus, under the Supreme

Court's most recent decision interpreting an OCIP, *TIC Energy & Chemical, Inc. v. Martin*, 498 S.W.3d 68 (Tex. 2016), all downstream contractors (including a general contractor such as Manhattan | Vaughn) and their employees are the statutory employees of the owner for purposes of the Act. Because a key goal of the Act is mutual protection from personal injury claims by those engaged in a common endeavor, and because Manhattan | Vaughn is a statutory co-employee of Texas A&M with all workers on site, the exclusive remedy applies even if Manhattan | Vaughn somehow "provided nothing" as the Garcias assert.

ARGUMENT

The case law on this issue is well developed and one sided. Texas courts have interpreted § 406.123 to provide broad exclusive remedy protection to all tiers of contractors on a project when a general contractor provides workers compensation insurance. Likewise, and consistent with the broad definition provided in the Act, the courts have interpreted the term "general contractor" liberally to apply to owners such as Texas A&M. The message that emerges from this jurisprudence is remarkably consistent and clear: the Act is designed to encourage broad coverage; when an owner or general contractor agrees with a subcontractor to provide workers compensation insurance, and workers compensation insurance is in fact in place, the purposes of the Act are served, and the exclusive remedy applies. Death benefits were paid to Angel Garcia's family,

all in accord with the workers compensation insurance provided by Manhattan | Vaughn to Lindamood, his employer, under the OCIP.

I. <u>The Garcias' Insistence That Manhattan | Vaughn Is Not Entitled To The Exclusive Remedy Rule Because It Provided Nothing Is Contrary To Two Decades Of Texas Case Law</u>

The Garcias' exclusive remedy arguments are all founded on a single faulty premise – that Manhattan | Vaughn "provided nothing." (Appellees Br. at pp. 13-14). For decades, Texas courts have rejected this argument. Instead, they have consistently held that a general contractor provides workers compensation insurance by incorporating an OCIP that includes workers compensation insurance into its subcontracts and requiring enrollment in the program.

From the standpoint of the construction industry, this case law provides the certainty the Act is designed to provide. General contractors seeking to provide broad coverage to all workers on a site can be assured that they will be entitled to exclusive remedy protection provided: (1) there is an OCIP in place with workers compensation insurance; and (2) the subcontractors' required participation in the OCIP is memorialized in a written agreement. That was done here. Thus, contrary to the Garcias' assertion that Manhattan | Vaughn "provided nothing," Manhattan | Vaughn provided workers compensation insurance under a written agreement in precisely the manner permitted by Texas law.

A. <u>A general contractor provides workers compensation insurance by requiring a subcontractor's enrollment in an OCIP</u>

The position that Manhattan | Vaughn advances here – that it provided workers compensation insurance by requiring Lindamood to enroll in the Texas A&M OCIP – was first articulated in the very first reported case to address the issue, *Williams v. Brown & Root, Inc.*, 947 S.W.2d 673 (Tex. App.—Texarkana 1997, no writ). In that case, Eastman, the owner, contracted with Brown & Root for a large construction project at Eastman's Harris County plant. Brown & Root then subcontracted a portion of its work to Tracer. The project was insured under Eastman's OCIP.

As an enrollee in the OCIP, Tracer received its own workers compensation policy for the project, and both Brown & Root and Tracer reduced their contract prices by the cost of providing workers compensation coverage. *Id.* at 675. Williams, a Tracer employee, was injured and obtained workers compensation benefits as a result of the claim. Williams then filed a third party lawsuit against Eastman and Brown & Root. The trial court held that based on the workers compensation insurance provided through the OCIP, Brown & Root was immune from suit, and the Texarkana Court of Appeals affirmed. *Id.*

The injured employee in *Williams v. Brown & Root* raised several of the same arguments the Garcias now advance twenty years later, none of which were persuasive then and are even less persuasive now. One of those arguments was that Eastman, the owner, and not Brown & Root, provided the workers compensation coverage under the OCIP, so that Brown & Root did not meet the requirements of TEX. REV. CIV. STAT. ANN. art. 8308-3.05(e), the predecessor statute to the present day § 406.123. The court, however, concluded that since Brown & Root had reduced its contract price with Eastman in the amount of the premium, it had paid for the workers compensation insurance. In addition, the court made the common sense observation that it is only incumbent upon the general contractor to "provide" the insurance, but not to "pay" for it under § 406.123. *Id.* at 678. That has remained the law since *Williams*, and it was re-affirmed by the Texas Supreme Court in *HCBeck*.

B. *HCBeck* further solidified the broad application of the exclusive remedy under § 406.123

Advance twelve years to *HCBeck, Ltd v. Rice*, 284 S.W.3d 349 (Tex. 2009), the case that both parties to this appeal claim is dispositive. *HCBeck* was an affirmation of the logic of *Williams* and a continuation of Texas appellate courts' broad application of the exclusive remedy provision when workers compensation insurance is provided through an OCIP. The Texas Supreme Court summarized its holding and the injured worker's argument in the second paragraph of that opinion:

> The court of appeals held that a general contractor does not "provide" coverage in the manner contemplated by section 406.123(a) when its written agreement with the subcontractor ***requires only*** that the subcontractor enroll in the site owner's workers' compensation insurance plan. ***We disagree.*** (emphasis added).

HCBeck, 284 S.W.3d at 350 (internal citation omitted).

In stark contrast, the holdings of the non-OCIP cases upon which the Garcias rely hold that "merely requiring a subcontractor to procure [its own] coverage" is insufficient for the purposes of § 406.123. (Br. Appellee, p. 16, n.1); *see also Clinard v. CXT Inc.*, No. W–12–CV–116, 2013 WL 12126252, at *4 (W.D. Tex. May 17, 2013) ("There does not appear to be any authority where a mere contractual requirement for ***self-supplied coverage*** by a subcontractor has been held to entitle a general contractor to invoke the exclusive remedy provision."). *HCBeck* directly addressed whether a requirement for a subcontractor to enroll in an OCIP satisfies § 406.123 and held that it does. Thus, contrary to the Garcias' assertion, the law in Texas is that a general contractor provides workers compensation insurance as contemplated by § 406.123(a) when it "requires only" that the subcontractor enroll in an OCIP, provided that the OCIP includes workers compensation insurance.

Here, Manhattan | Vaughn provided workers compensation coverage to Lindamood through the Texas A&M OCIP. The terms of the OCIP were included in the contract between Texas A&M and Manhattan | Vaughn and were, in turn,

expressly incorporated into the subcontract between Manhattan | Vaughn and Lindamood. The subcontract price of Lindamood was reduced to account for the savings in insurance premiums, including workers compensation premiums, achieved through participating in the OCIP.

II. There Is No "Ultimate Responsibility" Requirement In Texas

The Garcias misconstrue a single line in *HCBeck* as standing for the proposition that, in the context of an OCIP, the general contractor is not entitled to exclusive remedy protection unless it takes "ultimate responsibility" for ensuring that workers compensation is in place. This is a misreading of *HCBeck*, as clearly evidenced by the *HCBeck* Court's own uncertainty about how such a requirement would work:

> It is not clear, either from the court of appeals' holding or the dissent, what kind of guarantee would be required of a general contractor to adequately "provide" workers' compensation insurance coverage to secure the exclusive remedy defense in the absence of directly obtaining and paying for workers' compensation coverage for its subcontractor's employees.

HCBeck, 284 S.W.3d at 359. Further, the Texas Legislature has created a scheme that confers "statutory employer" status based on the voluntary provision of workers compensation insurance through a written agreement, as opposed to a minority of states, whose schemes resemble the "ultimate responsibility" system for which the Garcias advocate here.

A. **The Act confers statutory employer status based on voluntary provision of workers compensation insurance, not ultimate responsibility**

As Texas courts have consistently recognized, broad application of the exclusive remedy rule through § 406.123 is not a one-sided affair. Rather, particularly in a state such as Texas that allows nonsubscription, the exclusive remedy is the incentive necessary to further the Act's chief goal – broad coverage of Texas employees for work-related injuries. The converse is that limiting the application of the exclusive remedy provision limits coverage. As the *HCBeck* court put it, "interpreting the statute in a way that favors blanket coverage to all workers on a site aligns more closely with the Legislature's 'decided bias' for coverage." *HCBeck*, 284 S.W.3d at 359. Conversely:

> [H]olding that HCBeck does not "provide" workers' compensation because it has not directly paid for or ***somehow guaranteed payment*** of the policy via a line of credit would thwart the usefulness of controlled insurance programs that allow the highest-tiered entity to ensure quality and uninterrupted coverage to the lowest-tiered employees. . . . Such a scheme defeats the entire purpose of securing a blanket OCIP and results in duplicative coverage and inefficient use of resources.

HCBeck, 284 S.W.3d at 359–60 (emphasis added).

1. The Texas system is an intentional departure from the approach of many states, which have ultimate responsibility systems

The Garcias argue that in order for a general contractor to be a statutory employer entitled to tort immunity, it must do two things: "(a) require the subcontractor to get insurance, and (b) make itself 'ultimately responsible for obtaining alternate workers compensation insurance' if the subcontractor fails." (Br. Appellees, p. 7). Some states have taken something of a similar approach to this.[4] In a minority of states, statutory employer status is non-negotiable. The obligation to provide workers compensation flows upstream by statutory mandate,

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[4] These states include: Colorado, *Buzard v. Super Walls, Inc.*, 681 P.2d 520, 523 (Colo. 1984) (Upstream contractors were entitled to comp bar even where injured worker received comp benefits through his direct employer's policy); Georgia, *England v. Beers Constr. Co.*, 479 S.E.2d 420, 422 (Ga. Ct. App. 1996) ("an entity who is secondarily liable for workers' compensation benefits . . . is consequently entitled to tort immunity"); Kentucky, *Pennington v. Jenkins-Essex Constr., Inc.*, 238 S.W.3d 660, 663 (Ky. Ct. App. 2006) ("[t]he act [discourages owners and contractors from hiring fiscally irresponsible subcontractors] by imposing liability upon the 'up-the-ladder' contractor for [workers] compensation . . . . As a result, an entity 'up-the-ladder' from the injured employee . . . is entitled to immunity . . . ."); Mississippi, *Salyer v. Mason Techs. Inc.*, 690 So. 2d 1183, 1185 (Miss. 1997) ("the overall responsibility of the general contractor for getting subcontractors insured, and his latent liability for compensation if he does not, should be sufficient to [entitle him to immunity]"); New Mexico, *Street v. Alpha Constr. Servs.*, 143 P.3d 187, 189 (N.M. Ct. App. 2006) ("The special or statutory employer is on the hook to provide benefits to an employee, and therefore receives the *quid pro quo* of immunity from suit from special or statutory employees."); Oklahoma, *Newport v. Crane Serv. Inc.*, 649 P.2d 765, 767 (Okla. 1982) ("The tort immunity created by our compensation law . . . ascends the full length of the statutory employment ladder and encompasses the immediate, intermediate and principal hirers of any entity . . . . Each of these entities is secondarily answerable in compensation."); and Pennsylvania, *McCarthy v. Dan Lepore & Sons Co.*, 724 A.2d 938, 941 (Pa. Super. Ct. 1998) ("The vertical relationship is essential to the test for statutory immunity because, by virtue of the vertical relationship, all of the contractors up the ladder remain potentially liable under the Act . . . .").

irrespective of any written agreement. In these states, the statutory scheme requires all tiers of contractors to carry workers compensation insurance and permits injured workers to "reach upstream" if their direct employer fails to do so. *See, e.g.*, *Buzard*, 681 P.2d at 523. By extension, exclusive remedy protection not only applies to the direct employer, but also to those entities that have control and authority over the direct employer, such as a general contractor.

Thus, in these states the exclusive remedy is extended because the latent liability,[5] secondary liability,[6] or potential liability[7] of the upstream contractors is built into the statutory schemes. In other words, in those systems, the upstream contractors are "ultimately responsible" for workers compensation benefits by statute. But of course, even in states where ultimate responsibility is required by statute, workers compensation is not designed as a simple mandate to "provide coverage or else." Rather, it is a legislated *quid pro quo*. So, because the statutory schemes impose ultimate responsibility on all upstream contractors, they likewise extend the exclusive remedy to those contractors.

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[5] *See Salyer*, 690 So. 2d at 1185.
[6] *See England*, 479 S.E.2d at 422; *Newport*, 649 P.2d at 767.
[7] *See McCarthy v. Dan Lepore & Sons Co.*, 724 A.2d at 941-42.

2. <u>In 1983, Texas took a different approach when it added the written agreement provision now codified as § 406.123</u>

Texas has taken a different approach. In 1983, an amendment to the Act "provided, for the first time, for ***voluntary*** employer status for upstream entities in the contracting chain through the use of written agreements between parties." *Entergy*, 282 S.W.3d at 439 (citing Act of May 28, 1983, 68th Leg., R.S., ch. 950, § 1, Sec. 6, 1983 Tex. Gen. Laws 5210, 5210-11) (emphasis added). Section 406.123 (and its predecessors) are therefore premised on voluntary "provision" of workers compensation insurance, not ultimate responsibility.

The Garcias attempt to sidestep this fundamental distinction between Texas's provision-based statutory employer scheme and other states' ultimate responsibility-based schemes by arguing that in Texas, the ultimate responsibility requirement is built into the statute's definition of "provide." In other words, the Garcias argue to provide means to bear ultimate responsibility. But as this Court has held, "provide" is an undefined term in the Act that must be interpreted in accordance with its ordinary meaning. *Hunt Constr. Grp., Inc. v. Konecny*, 290 S.W.3d 238, 245 (Tex. App.—Houston [1st Dist.] 2008, pet. denied) (citing *Cities of Austin, Dallas, Fort Worth & Hereford v. Sw. Bell Tel. Co.*, 92 S.W.3d 434, 442 (Tex. 2002)). "The ordinary meaning of the word 'provide' is 'to supply or make

available.'" *Id.* (citing WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 948 (1990)).

In *Hunt*, while deciding whether a general contractor was required under § 406.123 to purchase the workers compensation insurance, this Court noted:

> Because we must give effect to every word in the statute, we conclude that the Legislature used the word "provides" intentionally. Had the Legislature intended for "provide" to mean "purchase," it could simply have used the word "purchase" instead. Alternatively, the Legislature could have defined "provide" to mean "purchase" in the statute's definition section. The Legislature chose neither of these options.

Id. Likewise, had the Legislature intended for "provide" to mean "require the subcontractor to get insurance and make itself ultimately responsible for alternate workers compensation insurance if the subcontractor fails," it could have defined the term in this way. *See* (Br. Appellees, p. 7). Indeed, had the Legislature intended this to be the structure of the Act's statutory employer provision, there is no shortage of examples from other states that have structured their schemes in exactly this manner. But the Legislature did not exercise this option, choosing instead to condition statutory employer status on the voluntary provision of workers compensation insurance, and for good reason.

B. **<u>In the Texas voluntary workers compensation system, an ultimate responsibility requirement would not further the Act's goals</u>**

Texas's approach makes sense within the context of the Act, taken as a whole. On the other hand, an ultimate responsibility requirement (in addition to being unfaithful to the language of the statute) would run counter to the objective of § 406.123 of the Act, i.e., to "ensure coverage of subcontractors and their employees." *HCBeck*, 284 S.W.3d at 356. So, in Texas, the consequence of not having workers compensation insurance is the loss of immunity and certain common law defenses. This consequence is the same whether or not a general contractor is contractually obligated to be ultimately responsible for workers compensation coverage. In other words, whether or not Manhattan | Vaughn agreed to be ultimately responsible for workers compensation coverage in the event the OCIP was terminated, the end result of that termination is that Manhattan | Vaughn loses the protection of the exclusive remedy under § 406.123 and is potentially a "deemed employer," losing its common law defenses to the negligence claims. Likewise, the result is the same for Texas workers. There is no workers compensation in place, and the worker is left to pursue its remedy in court.

This cannot be the intended result of the Legislature in a state such as Texas, where:

> The comp system quid pro quo—exchanging uncertain tort recovery for no-fault medical and income benefits—has been the embedded

> public policy of Texas since Woodrow Wilson became President, and wider coverage—that is, *more* injured workers receiving such compensation—only advances that policy.

Entergy, 282 S.W.3d at 476 (Willet, J., concurring). Rather, as appeals court after appeals court has done before, this Court should read the Act in a way that "results in expanded jobsite coverage by urging premises owners to secure coverage for their subcontractors' workers." *Id.* at 475-76. When a general contractor such as Manhattan | Vaughn furthers that purpose by incorporating the OCIP into its downstream contract, and workers compensation is actually in place, the exclusive remedy should apply. Adding further technicalities, such as the ultimate responsibility requirement proposed by the Garcias, would only serve to inject uncertainty into the system and stifle coverage.

III. Even If *HCBeck* Added An "Ultimate Responsibility" Requirement To The Statute, Manhattan | Vaughn Is Still Entitled To Exclusive Remedy Protection

There is no ultimate responsibility requirement in Texas, but perhaps more importantly from the standpoint of the construction industry, even if there was an ultimate responsibility requirement, the Garcias' argument still does not work. There is an alternate method by which general contractors like Manhattan | Vaughn are entitled to the exclusive remedy: as co-employees of the owner entitled to mutual protection against personal injury claims.

A. <u>Texas A&M is a "general contractor" as contemplated in § 406.123</u>

Texas A&M is not a party to this appeal. Although not a general contractor in the traditional sense, it is nonetheless important that Texas A&M qualifies as a "general contractor" that provides workers compensation insurance for the purposes of § 406.123. As the Texas Supreme Court held in *Entergy Gulf States v. Summers*, the Legislature defined the term "general contractor" broadly, and that broad definition easily encompasses owners, such as Texas A&M, that procure work through a contractor like Manhattan | Vaughn and provide workers compensation insurance through an OCIP.

In that case, Entergy contracted with IMC, a general contractor, to perform maintenance, repair, and other technical services at various facilities owned by Entergy. The parties agreed that Entergy would provide workers compensation coverage for IMC's employees through an OCIP. Entergy complied with this obligation. John Summers, an IMC employee, was injured while working at an Entergy plant. Summers applied for, and received, workers compensation benefits through the OCIP policy. Summers then sued Entergy for negligence, and Entergy moved for summary judgment on the ground that it was a statutory employer immune from common law tort suits. *See* Tex. Lab. Code § 408.001(a). The trial court agreed and granted judgment for Entergy, but the court of appeals reversed. *Summers v. Entergy Gulf States, Inc.*, 282 S.W.3d 511 (Tex. App.—Beaumont,

2004, pet. granted). The Texas Supreme Court granted Entergy's petition for review and framed the issue as follows:

> [W]e decide whether a premises owner that contracts for the performance of work on its premises, and provides workers' compensation insurance to the contractor's employees pursuant to that contract, is entitled to the benefit of the exclusive remedy defense generally afforded only to employers by the Texas Workers' Compensation Act.

Entergy, 282 S.W.3d at 435.

In other words, the Court faced the issue of whether a premises owner could be a "general contractor [that] provides workers' compensation insurance coverage to the subcontractor and the employees of the subcontractor" as contemplated by § 406.123(a) of the Texas Labor Code. *See id.* at 435-37.

The Court noted that, in deciding what the Legislature meant by "general contractor," it would not look to the ordinary or commonly understood meaning because the Legislature supplied its own definition. *Id.* at 437 (citing Tex. Gov't Code § 311.011(b)). The Legislature defined "general contractor" as "a person who undertakes to procure the performance of work or a service, either separately or through the use of subcontractors." Tex. Lab. Code § 406.121(1). According to the Court, the dispute therefore centered on whether one who undertakes to procure the performance of work could include a premises owner or whether it was limited to non-owner contractors. Addressing this central dispute, the Court held as follows:

> According to Black's Law Dictionary, "undertake" generally means to "take on an obligation or task," and "procurement" means "the act of getting or obtaining something." In other words, a general contractor is a person who takes on the task of obtaining the performance of work. That definition does not exclude premises owners; indeed, it describes precisely what Entergy did.

Entergy, 282 S.W.3d at 437-38 (internal citations omitted).

That definition also describes precisely what Texas A&M did here. Texas A&M entered into a contract with Manhattan | Vaughn as the general contractor for construction work on the Kyle Field renovation. Thus, because Texas A&M took on the task of obtaining the performance of work, it is a general contractor as defined by the statute.

B. Under the Texas Supreme Court's most recent OCIP opinion, Garcia and Manhattan | Vaughn are co-employees

As the Texas Supreme Court recently noted, "mutual protection from personal injury claims by those engaged in a common endeavor is a valuable and a significant component of the statutory scheme." *TIC Energy & Chem., Inc. v. Martin*, 498 S.W.3d 68 (Tex. 2016). In *TIC Energy*, an employee of the owner sued TIC Energy, a subcontractor, which was enrolled under the project's OCIP. The Supreme Court found, however, that since TIC Energy was a statutory employee of the owner under the rubric of § 406.123, TIC Energy and the owner's employees were co-employees. Thus, TIC Energy enjoyed immunity from the claims of the owner's employees. *Id.* at 78 ("[W]e hold TIC is entitled to rely on

the Workers' Compensation Act's exclusive-remedy defense as [the plaintiff's] co-employee."). Under this reasoning, Manhattan | Vaughn and Garcia are fellow employees of Texas A&M engaged in a common endeavor and are entitled to mutual protection against personal injury claims.

More recently, in *Berkel & Co. Contractors, Inc. v. Lee*, No. 14-15-00787-CV, 2017 WL 2986856, --- S.W.3d ---, (Tex. App.—Houston [14th Dist.] Jul. 13, 2017, no pet. h.), the Fourteenth Court of Appeals reversed a judgment in favor of the employee plaintiff and applied the exclusive remedy provision on this very basis. There, an employee of the general contractor, Skanska, suffered a job site injury while one of Skanska's subcontractors, Berkel, was attempting to complete a foundation piling. The applicability of the exclusive remedy provision in the Act was the central issue in the case, and the court framed the issue as follows:

> To resolve this central issue, we must first answer a threshold question: May Berkel claim the exclusive-remedy defense when Berkel is not Lee's actual employer or co-employee?

Id. at *4.

The court noted that the undisputed evidence showed that the general contractor Skanska agreed to provide workers compensation insurance to all of its subcontractors and their employees through a contractor controlled insurance program ("CCIP"), similar in nature to an OCIP. Just as here, Skanska required its subcontractors to enroll in the CCIP before performing work on the job site. Under

these facts, the court stated that "for the purposes of the Act, Skanska is Berkel's statutory employer, and Lee, as Skanska's actual employee, is Berkel's statutory co-employee." *Id.* at *5. Citing *TIC Energy*, the court then held:

> As a co-employee, Berkel is entitled to rely on the Act's exclusive-remedy provision, meaning that the trial court erred by rendering judgment against Berkel on the findings that Berkel was negligent and grossly negligent.

Id.

Thus, Manhattan | Vaughn is entitled to the exclusive remedy, both as a provider under the Texas A&M OCIP under the reasoning of *HCBeck* and as Garcia's co-employee under the reasoning of *TIC Energy*.

CONCLUSION AND PRAYER

The exclusive remedy is unavoidable in this case. Manhattan | Vaughn provided workers compensation insurance as contemplated by the Act, coverage was in place, and the Garcias received workers compensation benefits as prescribed for Mr. Garcia's unfortunate death. As a result, the exclusive remedy rule applies. The trial court's ruling to the contrary runs afoul of a substantial body of Texas case law and frustrates the purpose of the Act. It also ignores the most recent Texas Supreme Court precedent interpreting OCIPs, which unequivocally extends exclusive remedy protection throughout all tiers on a project and provides an alternate means for extending exclusive remedy protection to Manhattan | Vaughn.

As a result, Amici Curiae request that the Court reverse the judgment of the trial court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief is in compliance with Texas Rule of Appellate Procedure 9.4 because it contains 7573 words and has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font for text and 12-point Times New Roman font for footnotes, which meets the typeface requirements.

/s/ Patrick J. Wielinski

CERTIFICATE OF SERVICE

I certify that on September 25, 2017, a true and correct copy of this brief was served on all counsel of record in this case electronically through the electronic filing manager in compliance with the Texas Rules of Civil Procedure.

/s/ Patrick J. Wielinski