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# Comparative Responsibility in Nonsubscriber Litigation Revisited after Kroger Co. v. Keng.

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# COMPARATIVE RESPONSIBILITY IN NONSUBSCRIBER LITIGATION REVISITED AFTER *KROGER CO. v. KENG*

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## I. INTRODUCTION

On its face, the Texas Supreme Court's decision in *Kroger Co. v. Keng*[1] apparently resolved the question of whether an employer who does not subscribe to workers' compensation (a nonsubscriber) can avail itself to Texas's proportionate responsibility scheme set forth in Chapter 33 of the Texas Civil Practice and

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1. 23 S.W.3d 347 (Tex. 2000).

Remedies Code.[2] The answer, according to *Keng*, is "no."[3] The facts of *Keng*, however, involved only an employee-plaintiff and one defendant, the nonsubscribing employer.[4] The question left unresolved by *Keng* is whether proportionate responsibility is available in nonsubscriber cases involving additional independently liable defendants. An independently liable defendant is a defendant *other than* the nonsubscribing employer for whom the nonsubscribing employer is not vicariously liable. As discussed below, there is no reason under *Keng*'s rationale that an employer should not benefit from the proportionate responsibility of other independently liable defendants for the plaintiff's damages.[5]

In *Keng*, the Texas Supreme Court premised its holding on Texas Labor Code section 406.033 and concluded that a *nonsubscribing employer* is prohibited from proving that its *employee* was negligent.[6] The *Keng* Court declined to decide (as it was urged to do) whether proportionate responsibility was per se unavailable to nonsubscribing employers under the Texas Civil Practice and Remedies Code section 33.002(c)(1).[7] Therefore, on its face, *Keng* does not preclude an independently liable non-employer defendant

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2. *See* Kroger Co. v. Keng, 23 S.W.3d 347, 352 (Tex. 2000) (holding that the legislature did not intend to impliedly revoke the statutory bar against nonsubscribing employers using an employee's negligence as an affirmative defense; therefore, "a nonsubscribing employer is not entitled to a jury question on its employee's alleged comparative responsibility").

3. *Id.*

4. *Id.* at 347-48.

5. *See id.* at 351-52 (providing an analysis of proportionate responsibility in the context of a case involving only an employee and a nonsubscribing employer but not addressing the situation in which another independently liable defendant may be a party).

6. *Id.* (providing that "a finding of contributory negligence is a prerequisite to a finding of comparative responsibility . . . [; y]et, section 406.033 prohibits this finding"). According to Texas Labor Code section 406.033:

> (a) In an action against an employer who does not have workers' compensation insurance coverage to recover damages for personal injuries or death sustained by an employee in the course and scope of the employment, it is not a defense that:
> (1) the employee was guilty of contributory negligence;
> (2) the employee assumed the risk of injury or death; or
> (3) the injury or death was caused by the negligence of a fellow employee.

TEX. LAB. CODE ANN. § 406.033(a)(1)-(3) (Vernon 2006).

7. *Keng*, 23 S.W.3d at 352 (stating that "in resolving whether the comparative-responsibility statute applies in a nonsubscriber case, we need not determine, as Kroger urges, whether a suit under section 406.033 [of the Texas Labor Code] is 'an action to collect workers' compensation benefits under the workers' compensation laws of the state'" (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 33.002(c)(1) (Vernon 1997))).

from relying upon the provisions of Chapter 33 to reduce its percentage of responsibility for the plaintiff's harm in nonsubscriber cases.[8] Logically, if Chapter 33 is applied to a case involving a nonsubscribing employer, an independently liable defendant, and a partially responsible plaintiff, the result would be that the nonsubscribing employer's liability is reduced (or even potentially eliminated) by virtue of the plaintiff's fault.[9]

When considering the ramifications and rationale of *Keng*, the logical implication is that it was wrongly decided and should be reconsidered. *Keng*, however, remains the law with respect to claims involving only employee-plaintiffs and nonsubscribing employers. Regardless, the thesis of this Article is that proportionate responsibility should be applied as written in Chapter 33 of the Texas Civil Practice and Remedies Code in nonsubscriber cases involving additional independently liable defendants.[10] The Texas Supreme Court's recent decision in *F.F.P. Operating Partners, L.P. v. Duenez*,[11] a decision involving the Dram Shop Act, provides additional support for this thesis.[12] In *Duenez,* the court noted the legislature's clear intent to protect the policy of fault-based apportionment of responsibility set forth in Chapter 33 and held, consistent with its express language, that proportionate responsibility

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8. *See id.* (refusing to determine whether a suit brought under section 406.033 qualifies as a workers' compensation action). The court noted that section 33.002(c)(1) does not apply in a suit by an employee against a nonsubscribing employer, because section 406.033 prevents a finding of contributory negligence against an employee, which is required for a finding of comparative responsibility. *Id.* However, the court did not comment on actions against other independently liable defendants that are not classified as nonsubscribing employers. *Id.*; *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 33.003(a) (Vernon Supp. 2006) (directing that the trier of fact will apportion the percentage of responsibility for harm to each claimant, defendant, settling person, and responsible third party).

9. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 33.001 (Vernon 1997) (directing that "[i]n an action to which this chapter applies, a claimant may not recover damages if his percentage of responsibility is greater than [fifty] percent"); TEX. CIV. PRAC. & REM. CODE ANN. § 33.012(a) (Vernon Supp. 2006) (stating that if a claimant qualifies for recovery, the amount of recoverable damages will be reduced by a percentage equal to that of the claimant's responsibility).

10. *See generally* TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.001-.017 (Vernon 1997) (articulating the law of proportionate responsibility in Texas).

11. 50 Tex. Sup. Ct. J. 102, 2006 WL 3110426 (Tex. Nov. 3, 2006).

12. F.F.P. Operating Partners, L.P. v. Duenez, 50 Tex. Sup. Ct. J. 102, 106-07 (holding that proportionate responsibility applies to all tort claims except those excepted by statute).

applies to all tort cases except those clearly and expressly excluded by statute.[13]

## II. The Parallel Historical Development of Workers' Compensation and Proportionate Responsibility

### A. *Development of Texas's Workers' Compensation Coverage*

It is helpful to understand the historical background in which the allegedly adverse Texas workers' compensation and proportionate responsibility schemes developed. These schemes developed at different times and protect different policy interests.[14]

The *Keng* decision elaborates on the history of Texas's workers' compensation scheme and, in particular, Texas Labor Code section 406.033:

> To put the [l]egislature's intent in enacting section 406.033 in context, we briefly review the history of the [Texas] Workers' Compensation Act. The Texas Legislature enacted the Act in 1913 in response to the needs of workers, who, despite escalating industrial accidents, were increasingly being denied recovery. The Act allowed injured workers, whose employers subscribed to workers' compensation insurance, to recover without establishing the employer's fault and without regard to the employee's negligence. In exchange, the employees received a lower, but more certain, recovery than would have been possible under the common law. Employers were, how-

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13. *Id.* at 108 (holding that "it is a fundamental tenet of tort law that an entity's liability arises from its own injury-causing conduct"). The court observed that Texas's proportionate responsibility statute required that the trial court apportion responsibility among all parties who caused or contributed to the harm. *See id.* at 111 (citing Tex. Civ. Prac. & Rem. Code Ann. § 33.003(a) (Vernon Supp. 2006)) (declaring that "[t]he trier of fact . . . [shall] determine the percentage of responsibility . . . for [each claimant, defendant, settling person, and responsible third party. . .] with respect to each person's causing or contributing to cause in any way the harm for which recovery of damages is sought"). In discussing legislative intent, the court found that the "[t]he [l]egislature seemed intent on creating a general scheme of proportionate responsibility, subject to specific statutory exclusions." *Id.* at 110. Thus, the court held that "the legislative intent [of the Dram Shop Act] to protect the public and provide a potential remedy against an alcohol provider does not equate to a guarantee of recovery against a provider by an injured party." *Id.* at 109.

14. *See* Randall O. Sorrels & Jason B. Ostrom, *Should an Employee's Negligence be Submitted in a Non-Subscriber Case?*, 63 Tex. B.J. 331, 331-32 (2000) (discussing the development of both the Texas Workers' Compensation Act and the comparative negligence statute). This Article also provides a more detailed account of the split in authority that culminated in the *Keng* decision. *Id.* at 334-35.

ever, allowed to opt out of the system, resulting in their employees retaining their common-law rights.

To discourage employers from making that choice, the [l]egislature included within the Act a penalty provision, similar to section 406.033, that precluded nonsubscribing employers from relying on the traditional common-law defenses—contributory negligence, assumption of the risk, and fellow servant—in defending against their employees' personal-injury actions.[15]

Participation in workers' compensation is a voluntary choice, but nonsubscribing employers face certain consequences when they choose to not subscribe.[16] An injured employee has the power to sue the nonsubscribing employer and recover damages under common and statutory law.[17] The purpose of section 406.033, however, is designed to protect employees by encouraging employers to subscribe to workers' compensation coverage.[18] This encouragement is achieved through a penalty provision which precludes nonsubscribing employers from asserting common law defenses such as contributory negligence and assumption of the risk.[19] Thus, a non-

15. Kroger Co. v. Keng, 23 S.W.3d 347, 349-50 (Tex. 2000).

16. *See* TEX. LAB. CODE ANN. § 406.002 (Vernon 2006) (stating that "an employer may elect to obtain workers' compensation insurance coverage"); Cupit v. Walts, 90 F.3d 107, 109 (5th Cir. 1996) (discussing the choice available to employers and some of the consequences of non-participation); Brookshire Bros., Inc. v. Lewis, 997 S.W.2d 908, 912 (Tex. App.—Beaumont 1999, pet. denied) (explaining that a nonsubscriber employer is subject to "common law principles of negligence"); *see also* Randall O. Sorrels & Jason B. Ostrom, *Should an Employee's Negligence be Submitted in a Non-Subscriber Case?*, 63 TEX. B.J. 331, 331 (2000) (discussing that participation is a voluntary choice, but nonsubscribing employers face consequences for not participating).

17. Randall O. Sorrels & Jason B. Ostrom, *Should an Employee's Negligence be Submitted in a Non-Subscriber Case?*, 63 TEX. B.J. 331, 331 (2000); *see Brookshire Bros., Inc.*, 997 S.W.2d at 912 (recognizing the possibility of subjecting a nonsubscriber employer to "common law principles of negligence").

18. *See Keng*, 23 S.W.3d at 349-50 (noting that the Texas Labor Code encourages employers to carry workers' compensation insurance by penalizing nonsubscribers by eliminating certain common law defenses to employees' personal-injury suits). The code mandates that employers without workers' compensation insurance may not assert the defenses of contributory negligence, assumption of risk, or negligence of a fellow employee. *Id.* (citing TEX. LAB. CODE ANN. § 406.033(a) (Vernon 2006)).

19. TEX. LAB. CODE ANN. § 406.033(a) (Vernon 2006) ("[I]t is not a defense that: (1) the employee was guilty of contributory negligence; (2) the employee assumed the risk of injury or death; or (3) the injury or death was caused by the negligence of a fellow employee."); *see also* Brookshire Bros., Inc. v. Wagnon, 979 S.W.2d 343, 347 (Tex. App.—Tyler 1998, pet. denied) ("[T]he [nonsubscribing] employer's only defense may be that it was not negligent in causing the injury or that its employee was the sole proximate cause of the injury."); Harrison v. Harrison, 597 S.W.2d 477, 481 (Tex. Civ. App.—Tyler 1980, writ

subscribing employer risks being sued for unlimited damages and is prevented from asserting any claim that may reduce his percentage of liability.[20] This risk, therefore, encourages employers to subscribe to workers' compensation.[21]

## B. *Development of the Proportionate Responsibility Scheme*

Apart from the Texas Workers' Compensation Act (Workers' Compensation Act), Texas's proportionate responsibility scheme developed separately at a different time.[22] First enacted in 1973, the original purpose of proportionate responsibility (formerly known as "comparative responsibility" or "comparative negligence") was to ameliorate the harsh application of the defense of "contributory negligence."[23] Under contributory negligence, if a plaintiff was slightly at fault, the plaintiff was completely barred

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ref'd n.r.e.) (holding that a nonsubscriber was not eligible to assert "the common-law defenses of contributory negligence, assumption of the risk and fellow servant negligence"); J. Weingarten, Inc. v. Heatherly, 450 S.W.2d 693, 696 (Tex. Civ. App.—Houston [14th Dist.] 1970, no writ) (explaining the unavailability of common law defenses in cases involving a nonsubscriber); Potter v. Garner, 407 S.W.2d 537, 538 (Tex. Civ. App.—Tyler 1966, writ ref'd n.r.e.) (discussing that common law defenses were not available to the employer because he was a nonsubscriber).

20. Randall O. Sorrels & Jason B. Ostrom, *Should an Employee's Negligence be Submitted in a Non-Subscriber Case?*, 63 TEX. B.J. 331, 331 (2000); *see also* TEX. LAB. CODE ANN. § 406.033(a) (Vernon 2006) (codifying the lack of common law defenses for nonsubscribers).

21. *See Keng*, 23 S.W.3d at 349-50 (explaining that the penalties from section 406.033 encourage employers to obtain coverage).

22. *See id.* (discussing the history of the Workers' Compensation Act and comparative negligence); *see also* Randall O. Sorrels & Jason B. Ostrom, *Should an Employee's Negligence be Submitted in a Non-Subscriber Case?*, 63 TEX. B.J. 331, 331-32 (2000) (providing a historical discussion of both the workers' compensation scheme and the proportionate responsibility scheme).

23. *Keng*, 23 S.W.3d at 350 (citing Farley v. M. M. Cattle Co., 529 S.W.2d 751, 758 (Tex. 1975)). The court in *Farley* stated, "Particularly compelling is the fact that the [l]egislature has now adopted comparative negligence and thus evidenced its clear intention to apportion negligence rather than completely bar recovery." *Farley*, 529 S.W.2d at 758; *see also* Randall O. Sorrels & Jason B. Ostrom, *Should an Employee's Negligence be Submitted in a Non-Subscriber Case?*, 63 TEX. B.J. 331, 332 (2000) (noting that the 1973 comparative negligence statute alleviated the harsh outcomes resulting from the application of contributory negligence). According to the original 1973 statute, "a contributory-negligence finding against the plaintiff no longer automatically bar[red] recovery, but rather reduce[d] the plaintiff's recovery in proportion to his or her negligence." *Keng*, 23 S.W.3d at 350.

from recovery.[24] Conversely, the proportionate responsibility scheme sought to apportion damages based upon fault.[25] It allowed the plaintiff to recover damages even if the plaintiff was partly responsible for the injury.[26] Additionally, proportionate responsibility was designed to protect the defendant by providing that "a liable defendant is liable to a claimant only for the percentage of the damages found by the trier of fact equal to that defendant's percentage of responsibility."[27] Thus, the defendant was liable only for the amount of damages that the defendant actually caused. The only exception is when a defendant is found jointly and severally liable for a plaintiff's injuries.[28]

Furthermore, Texas's proportionate responsibility scheme has been revised on numerous occasions since 1973.[29] In 1995, the Texas Legislature formally changed the name from "Comparative Responsibility" to "Proportionate Responsibility."[30] Additionally, over the last decade, the Texas Legislature has focused its efforts on ensuring that defendants do not pay more than their percentage share—even at the expense of plaintiffs not fully recovering.[31] In

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24. *Keng*, 23 S.W.3d at 350; *see also* Randall O. Sorrels & Jason B. Ostrom, *Should an Employee's Negligence be Submitted in a Non-Subscriber Case?*, 63 TEX. B.J. 331, 332 (2000) (citing Parrott v. Garcia, 436 S.W.2d 897, 901 (Tex. 1969)) (stating that "[u]ntil 1973, contributory negligence served as a complete defense and absolute bar to the plaintiff's recovery").

25. *Keng*, 23 S.W.3d at 350 (explaining that the new comparative negligence scheme "reduce[d] the plaintiff's recovery in proportion to his or her negligence" as opposed to the harsh contributory negligence scheme that "automatically bar[red] recovery"); Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 430 (Tex. 1984) (providing "the law has advanced . . . to a more refined percent allocation of liability based on the relative harm caused by each defendant"); *see also* Cypress Creek Util. Serv. Co., v. Muller, 640 S.W.2d 860, 865 (Tex. 1982) ("The policy of the comparative negligence statute is to apportion all damages in relation to the percentage of fault found by the jury.").

26. *See* TEX. CIV. PRAC. & REM. CODE § 33.001 (Vernon 1997) (providing that claimant will recover as long as the claimant's percentage of responsibility is not greater than fifty percent); *see also* Act of Apr. 9, 1973, 63rd Leg., R.S., ch. 28, § 1, 1973, Tex. Gen. Laws 41 (repealed 1985) (codifying the first version of proportionate responsibility in Texas).

27. TEX. CIV. PRAC. & REM. CODE ANN. § 33.013(a) (Vernon Supp. 2006).

28. *Id.* § 33.013(b).

29. *Compare id.*, *with* Act of June 2, 2003, 78th Leg., R.S., ch. 204, §§ 4.01-.04, secs. 33.002(a), 33.003-.004, 2003 Tex. Gen. Laws 855, 855-56, *and* Act of May 4, 1995, 74th Leg., R.S., ch. 136, § 1, secs. 33.001-.003, 1995 Tex. Gen. Laws 971, 971-72, *and* Act of Apr. 9, 1973, 63rd Leg., R.S., ch. 28, § 1, 1973 Tex. Gen. Laws 41 (repealed 1985).

30. Act of May 4, 1995, 74th Leg., R.S., ch. 136, § 1, sec. 33.001, 1995 Tex. Gen. Laws 971, 971.

31. *Compare* TEX. CIV. PRAC. & REM. CODE ANN. § 33.013(b) (Vernon Supp. 2006) (providing for joint and several liability of defendant), *with* Act of June 2, 2003, 78th Leg.,

1995, the legislature lowered the threshold at which a plaintiff would be barred from recovery and made it harder to establish joint and several liability.[32]

For example, before 1995, a plaintiff could be as much as sixty percent responsible for his injuries and damages, and still recover.[33] After 1995, however, a plaintiff cannot recover if his responsibility exceeds fifty percent.[34] Additionally, before 1995, if the defendant's percentage of responsibility was as low as twenty percent (or fifteen percent for certain kinds of cases), then the defendant could be found jointly and severally liable.[35] Today, however, a defendant can only be jointly and severally liable if the defendant is found more than fifty percent responsible or if the defendant commits one of a number of crimes, including murder and sexual assault "with the specific intent to do harm to others."[36]

Additionally, in 1995, the legislature added provisions to the proportionate responsibility scheme that permitted defendants to join and assign fault to third parties.[37] In 2003, the legislature expanded those rights and empowered defendants to designate, as opposed to join, non-parties that cannot be identified (much less sued), thus reducing a plaintiff's recovery.[38] By enacting these provisions, the

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R.S., ch. 204, § 4.04, secs. 33.003-.004, 2003 Tex. Gen. Laws 855, 855-56 (allowing defendant to designate a responsible third party), *and* Act of May 4, 1995, 74th Leg., R.S., ch. 136, § 1, sec. 33.001, 1995 Tex. Gen. Laws 971, 971 (providing that claimant cannot recover if his percentage of responsibility is greater than fifty percent).

32. *See* Act of May 4, 1995, 74th Leg., R.S., ch. 136, § 1, sec. 33.001, 1995 Tex. Gen. Laws 971, 971 (providing that a claimant can no longer be as much as sixty percent responsible and still recover); *see also* Act of May 4, 1995, 74th Leg., R.S., ch. 136, § 1, sec. 33.013, 1995 Tex. Gen. Laws 971, 974 (showing that a defendant can only be found jointly and severally liable if his responsibility exceeds fifty percent).

33. Act of May 4, 1995, 74th Leg., R.S., ch. 136, § 1, sec. 33.001, 1995 Tex. Gen. Laws 971, 971.

34. Act of May 4, 1995, 74th Leg., R.S., ch. 136, § 1, sec. 33.001, 1995 Tex. Gen. Laws 971, 971.

35. Act of May 4, 1995, 74th Leg., R.S., ch. 136, § 1, sec. 33.013, 1995 Tex. Gen. Laws 971, 974.

36. TEX. CIV. PRAC. & REM. CODE ANN. § 33.013(b) (Vernon Supp. 2006); *see also* Morrell v. Finke, 184 S.W.3d 257, 290 (Tex. App.—Fort Worth 2005, pet. abated) (explaining that section 33.013 does not allow the court to impose "joint and several liability upon a party found to be five percent liable").

37. Act of May 4, 1995, 74th Leg., R.S., ch. 136, § 1, sec. 33.004, 1995 Tex. Gen. Laws 971, 972-73 (providing for joinder of responsible third parties).

38. Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 4.04, sec. 33.004, 2003 Tex. Gen. Laws 855, 855-56.

legislature has demonstrated that it regards the fault-based policy underlying the proportionate responsibility scheme as important.[39]

### C. *Interplay Between Workers' Compensation Scheme and Proportionate Responsibility Leads to a Split Among Texas's Courts of Appeals*

Section 406.033 of the Workers' Compensation Act does not expressly address proportionate responsibility.[40] By its terms, it only bars a nonsubscribing employer from relying on common law defenses such as contributory negligence.[41] Because of this, a split in authority developed among Texas's courts of appeals concerning the application of proportionate responsibility in nonsubscriber cases.[42]

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39. *See* F.F.P. Operating Partners, L.P. v. Duenez, 50 Tex. Sup. Ct. J. 102, 110, 108, 2006 WL 3110426 (Tex. Nov. 3, 2006) (holding that "[e]ven if this [c]ourt were to agree with the court of appeals that holding a provider vicariously liable for a patron's intoxication may be a legitimate public policy, we would still be constrained to faithfully apply the [l]egislature's statutory proportionate responsibility scheme" and noting that with the adoption of the 2003 amendments, "[t]he [l]egislature seemed intent on creating a general scheme of proportionate responsibility, subject to specific statutory exclusions").

40. *See* TEX. LAB. CODE ANN. § 406.033 (Vernon 2006) (providing that only contributory negligence cannot be used as a defense).

41. *Id.* Section 406.033 also precludes a nonsubscriber from relying defensively upon a plaintiff's assumption of the risk or the negligence of a fellow employee. *Id.* In the context of this Article, a negligent fellow employee would not be an independently liable defendant in that the employer would be vicariously liable for his conduct. *See, e.g.*, Baptist Mem'l Hosp. Sys. v. Sampson, 969 S.W.2d 945, 947 (Tex. 1998) (stating that "[u]nder the doctrine of respondeat superior, an employer is vicariously liable for the negligence of an agent or employee acting within the scope of his or her agency or employment, although the principal or employer has not personally committed a wrong"); *see also* Millan v. Dean Witter Reynolds, Inc., 90 S.W.3d 760, 767 (Tex. App.—San Antonio 2002, pet. denied); Espalin v. Children's Med. Ctr. of Dallas, 27 S.W.3d 675, 683 (Tex. App.—Dallas 2000, no pet.). Conceivably, one could have an independently liable employee who was not, for example, acting within the course and scope of his employment at the time he injured the plaintiff. Whether or not the pertinent provision of section 406.033 would preclude a nonsubscriber from relying upon proportionate responsibility in this context is beyond the scope of this Article.

42. *See* Kroger Co. v. Keng, 23 S.W.3d 347, 348 (Tex. 2000) (listing cases from courts of appeals forming a split in authority as to whether or not comparative responsibility could be applied to nonsubscriber cases). *Keng* outlined the split as follows:

> *Compare Brookshire Bros., Inc. v. Lewis*, 997 S.W.2d 908, 919 (Tex. App.—Beaumont 1999, pet. denied) (stating that in a nonsubscriber case, the employee's comparative negligence does not apply and should not be submitted to the jury), *Brookshire Bros., Inc. v. Wagnon*, 979 S.W.2d 343, 347 (Tex. App.—Tyler 1998, pet. denied) (same), *Torres v. Caterpillar, Inc.*, 928 S.W.2d 233, 237 n.3 (Tex. App.—San Antonio 1996, writ denied) (same), *and Holiday Hills Ret. & Nursing Ctr., Inc. v. Yeldell*, 686 S.W.2d 770,

The Amarillo Court of Appeals allowed nonsubscribing employers to assert the negligence of its employees and thus proportionately reduce liability in *Byrd v. Central Freight Lines, Inc.*[43] In this case, an employee of Central Freight Lines was injured when a forklift hit him.[44] The court upheld the trial court's decision to apportion damages between the nonsubscribing employer and the employee.[45] As support for its decision, the court cited *Texas Workers' Compensation Commission v. Garcia*,[46] a decision in which the Texas Supreme Court stated, "Although the [l]egislature has softened the defense of contributory negligence by adopting comparative responsibility . . . and this [c]ourt has abolished the defense of assumption of risk[,] . . . an injured employee pursuing the common law remedy must . . . prove that the employer was negligent and that [the employee] was not more than [fifty] percent negligent."[47] *Garcia*, however, was not about proportionate responsibility, and the Amarillo Court of Appeals even admitted that this language may be dicta.[48] Regardless, the Amarillo Court of Appeals decided that this language was "entitled to respect as a serious, carefully considered and carefully made comment concerning an element of a worker's non-subscriber action at law against

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774-75 (Tex. App.—Fort Worth 1985) (same), *rev'd on other grounds*, 701 S.W.2d 243 (Tex. 1985), *with Byrd v. Central Freight Lines, Inc.*, 976 S.W.2d 257, 259-60 (Tex. App.—Amarillo 1998) (holding that comparative negligence is an element of an employee's action against his or her nonsubscribing employer), *pet. denied per curiam*, 922 S.W.2d 447 (Tex. 1999).

*Id.; see also* Randall O. Sorrels & Jason B. Ostrom, *Should an Employee's Negligence be Submitted in a Non-Subscriber Case?*, 63 TEX. B.J. 331 (2000) (providing an in depth discussion regarding this split among the Texas courts of appeals).

43. 976 S.W.2d 257 (Tex. App.—Amarillo 1998), *pet. denied*, 922 S.W.2d 447 (per curiam), *overruled by* Kroger Co. v. Keng, 23 S.W.3d 347 (Tex. 2000). Note, however, that this case is no longer good law as the Texas Supreme Court in *Keng* later held that proportionate responsibility cannot be used in nonsubscriber cases. *See Keng*, 23 S.W.3d at 352-53 ("We disapprove of the court of appeals' opinion in *Byrd v. Central Freight Lines* . . . to the extent it holds otherwise.").

44. *Byrd*, 976 S.W.2d at 258.

45. *Id.* at 260.

46. 893 S.W.2d 504 (Tex. 1995).

47. Tex. Workers' Comp. Comm'n v. Garcia, 893 S.W. 504, 521 (Tex. 1995); *see Byrd*, 976 S.W.2d at 260 (quoting *Garcia*, 893 S.W.2d at 521).

48. *See Byrd*, 976 S.W.2d at 260 ("Even assuming arguendo that the challenged statement from *Garcia* is dicta, we are not disposed to ignore, disregard or refuse to follow it."); Randall O. Sorrels & Jason B. Ostrom, *Should an Employee's Negligence be Submitted in a Non-Subscriber Case?*, 63 TEX. B.J. 331, 334 (2000).

the employer outside of the Workers' Compensation Act."[49] Therefore, the Amarillo court held that proportionate responsibility was allowed in nonsubscriber cases.[50]

Other Texas courts of appeals were opposed to allowing an employee's negligence to be submitted in order to reduce the liability of a nonsubscribing employer. In *Holiday Hills Retirement & Nursing Center, Inc. v. Yeldell*,[51] *Brookshire Bros., Inc. v. Wagnon*,[52] and *Kroger Co. v. Keng*,[53] the appeals courts concluded that the percentage fault between an employee and a nonsubscribing employer could not be proportioned in order to reduce the nonsubscribing employer's liability.[54] These courts reasoned that because the Workers' Compensation Act precluded nonsubscribers from asserting common law defenses such as contributory negligence, nonsubscribers also should be precluded from asserting proportionate responsibility.[55] Due to these opposing views, the Texas

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49. *Byrd*, 976 S.W.2d at 260.

50. *Id.*

51. 686 S.W.2d 770 (Tex. App.—Fort Worth 1985), *rev'd on other grounds*, 701 S.W.2d 243 (Tex. 1985).

52. 979 S.W.2d 343 (Tex. App.—Tyler 1998, pet. denied).

53. 976 S.W.2d 882 (Tex. App.—Tyler 1998), *aff'd*, 23 S.W.3d 347 (Tex. 2000).

54. *See* Brookshire Bros., Inc. v. Wagnon, 979 S.W.2d 343, 347 (Tex. App.—Tyler 1998, pet. denied) (holding "that in an employee's suit against a nonsubscribing employer, comparative negligence is not applicable and should not be submitted to the jury"); Kroger Co. v. Keng, 976 S.W.2d 882, 893 (Tex. App.—Tyler 1998), *aff'd*, 23 S.W.3d 347 (Tex. 2000) (holding that the trial court did not commit error when refusing to submit a question of proportionate responsibility to the jury); Holiday Hills Ret. & Nursing Ctr. v. Yeldell, 686 S.W.2d 770, 775 (Tex. App.—Fort Worth 1985) (holding "that in employees' suits against a non-subscribing employer to the compensation law, comparative negligence is not applicable and should not be submitted to the jury"), *rev'd on other grounds*, 701 S.W.2d 243 (Tex. 1985); *cf.* Torres v. Caterpillar, 928 S.W.2d 233, 237 n.3 (Tex. App.—San Antonio 1996, writ denied) (noting that "[s]ince [defendant] was a non-subscribing employer, contributory negligence was not a defense, and therefore, the trial court properly disregarded the percentage causation the jury attributed to Mr. Torres's negligence in awarding damages against" the defendant); Woodlawn Mfg., Inc. v. Robinson, 937 S.W.2d 544, 547-48 (Tex. App.—Texarkana 1996, writ denied) (mentioning that nonsubscriber "Woodlawn is prohibited from asserting the common law defenses of contributory negligence, assumption of the risk, and fellow servant negligence"); *see also* Randall O. Sorrels & Jason B. Ostrom, *Should an Employee's Negligence be Submitted in a Non-Subscriber Case?*, 63 TEX. B.J. 331, 334-35 (2000) (providing a more in-depth discussion of relevant cases).

55. *See Brookshire Bros., Inc.*, 979 S.W.2d at 347 (stating that the "Worker's Compensation Act clearly seeks to exclude from jury consideration any issue submitting an employee's fault, negligence, or responsibility"); *Kroger Co.*, 976 S.W.2d at 893 ("We conclude that the Texas Legislature did not . . . back-door the rebirth of contributory negligence in nonsubscriber cases brought under the workers' compensation statute."); *Yeldell*,

Supreme Court granted review in *Keng* to decide whether proportionate responsibility should be available in nonsubscriber cases.[56]

## III. *KROGER CO. V. KENG* – THE SUPREME COURT STEPS IN

In *Keng*, the Texas Supreme Court addressed the split among the courts of appeals and resolved the issue in favor of the workers' compensation scheme's interests.[57] The court concluded that nonsubscribing employers could not use the defense of proportionate responsibility to reduce their percentage of fault for the plaintiff's damages.[58]

In this case, Kroger argued that section 406.033 of the Texas Labor Code did not bar a nonsubscribing employer from asserting proportionate responsibility and apportioning the liability based upon fault.[59] Rather, Kroger alleged that section 406.033 only precludes a nonsubscriber from asserting contributory negligence, a common law defense that would bar recovery completely.[60] The *Keng* Court rejected Kroger's argument.[61]

The court began by noting that the legislature enacted section 406.033 in order to "delineate explicitly the structure of an employee's personal-injury action against his or her nonsubscribing

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686 S.W.2d at 775 (holding, "[u]nder a plain reading of this statute, any negligence of the plaintiff . . . would avail the employer nothing. Under this statute, insofar as a nonsubscriber is concerned, all the plaintiff has to do is show that some negligence of the employer caused his injury"); *see also* Randall O. Sorrels & Jason B. Ostrom, *Should an Employee's Negligence be Submitted in a Non-Subscriber Case?*, 63 TEX. B.J. 331, 334-35 (2000) (providing a similar discussion about these courts' reasoning).

56. *See id.* Kroger Co. v. Keng, 23 S.W.3d 347, 348 (Tex. 2000) (acknowledging that the court heard the case to resolve the split in the courts of appeals).

57. *See* at 352 (stating that "by precluding contributory negligence as a defense[,] the [l]egislature intended that an employee's fault would neither defeat nor diminish his or her recovery"). The court further noted that this imposes a penalty to employers who elect to not carry workers' compensation insurance. *Id.*

58. *Id.* (holding that a nonsubscriber is not entitled to a proportionate responsibility question).

59. *See id.* at 350 (noting that Kroger emphasized that comparative-responsibility is a statutory defense, while section 406.033 "expressly precludes only certain common-law defenses"); *see* TEX. LAB. CODE ANN. § 406.033 (Vernon 2006) (addressing the interplay of common law defenses and Texas's workers' compensation insurance coverage).

60. *See Keng*, 23 S.W.3d at 350 (stating that Kroger contended that through the enactment of the comparative-responsibility statute, the [l]egislature reinstated "a nonsubscribing employer's ability to rely on its employee's comparative responsibility as a defense").

61. *See id.* (disagreeing with Kroger's argument that it should be able to avail itself of a comparative-responsibility defense).

employer" and that it had not changed its essential structure since 1917 "when it deleted proportionate reduction, the equivalent of comparative responsibility, from the penalty statute."[62] The court reasoned that the legislature "had many opportunities" to amend section 406.033 to clarify that a nonsubscriber could assert proportionate responsibility as a defense but did not do so.[63] The court reasoned that it could not, therefore, conclude that the legislature intended to *lessen* the penalty associated with not subscribing to workers' compensation by enacting proportionate responsibility.[64] In support of its position, the court cited *Nootsie, Ltd. v. Williamson County Appraisal District*[65] for the proposition that "courts must reject interpretations that defeat a statute's purpose if another reasonable interpretation exists."[66] Therefore, the court reasoned that by accepting Kroger's argument, the bar against asserting contributory negligence would be "repeal[ed] by implication."[67] Furthermore, the prohibition of asserting contributory negligence was never intended to be limited to only the "absolute-bar rule."[68]

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62. *Id.* at 350-51. As originally enacted, the predecessor to section 406.033 proportionately reduced a plaintiff's negligence in accordance with his fault. *Id.* at 350 (citing Act of Apr. 16, 1913, 33rd Leg., R.S., ch. 179, § 1, 1913 Tex. Gen. Laws 429, 429 (repealed 1989) (current version at TEX. LAB. CODE ANN. § 406.033) (Vernon 2006)).

63. *See* Kroger Co. v. Keng, 23 S.W.3d 347, 351 (Tex. 2000) (recognizing that as recently as 1989 when it wholly revised the Act, the legislature declined changing section 406.033 to allow nonsubscribing employers the benefit of a comparative-responsibility determination).

64. *See id.* (expressing that without clear legislative action, the court cannot assume the legislature desired to diminish the consequences imposed on nonsubscribing employers when it enacted the comparative-negligence statute). Although subscribing to workers' compensation is a voluntary choice, nonsubscribers face certain consequences. *See* TEX. LAB. CODE ANN. § 406.002 (Vernon 2006) (providing employers with the option to subscribe); Cupit v. Walts, 90 F.3d 107, 109 (5th Cir. 1996) (discussing the choice available to employers and some of the consequences of non-participation); Brookshire Bros., Inc. v. Lewis, 997 S.W.2d 908, 912 (Tex. App.—Beaumont 1999, pet. denied) (explaining that a nonsubscribing employee is subject to "common law principles of negligence"); *see also* Randall O. Sorrels & Jason B. Ostrom, *Should an Employee's Negligence be Submitted in a Non-Subscriber Case?*, 63 TEX. B.J. 331, 331 (2000) (discussing that participation is a voluntary choice, but nonsubscribing employers face consequences for not participating).

65. 925 S.W.2d 659 (Tex. 1996)

66. *Keng*, 23 S.W.3d at 351.

67. *Id.* ("Nor can we conclude that the [l]egislature intended to set aside over fifty years of precedent and repeal by implication its bar on contributory negligence as a defense.").

68. *Id.* ("We . . . disagree with Kroger's contention that section 406.033's language precluding contributory negligence means only that an employer cannot assert its em-

The court reasoned that for a nonsubscribing employer to assert proportionate responsibility, the employer must establish that the employee was negligent.[69] The court read section 406.033 as precluding a nonsubscribing employer from doing just that.[70] Therefore, according to *Keng*, "[i]t follows that by expressly precluding employers from relying on common-law contributory negligence, section 406.033 effectively prohibits an employer from relying on the statutory comparative-responsibility defense."[71] Thus, *Keng*'s practical point is that reliance on proportionate responsibility requires the nonsubscribing employer to prove the employee's negligence—section 406.033, however, precludes this.[72]

Nearly all aspects of the *Keng* decision are debatable, and some do not withstand close scrutiny. Just as section 406.033 delineates a plaintiff-employee's personal injury action against a nonsubscribing employer, so too does Chapter 33 delineate the rights and liabilities of *all* parties to *all* tort actions.[73] Likewise, while it is true that the legislature could have amended section 406.033 to clarify that it did not bar an employer from relying on proportionate responsibility, the legislature could also have amended Chapter 33 to clarify that it did not apply to nonsubscriber actions.[74] The court's

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ployee's negligence as an absolute bar to recovery." (citing David W. Robertson, *The Texas Employer's Liability in Tort for Injuries to an Employee Occurring in the Course of the Employment*, 24 ST. MARY'S L.J. 1195, 1199-1201 (1993))).

69. *See id.* at 351-52 (referring to Kroger's request for an assessment of comparative responsibility, which acknowledged "a finding of contributory negligence is a prerequisite to a finding of comparative responsibility").

70. *Id.* at 352. Section 406.033 of the Texas Labor Code mandates that a nonsubscribing employer is barred from asserting that the employee bringing a personal injury action is guilty of contributory negligence. TEX. LAB. CODE ANN. § 406.033 (Vernon 2006).

71. *Keng*, 23 S.W.3d at 352.

72. *Id.* at 351-52 ("Because comparative responsibility involves measuring the parties' comparative fault in causing the plaintiff's injuries, it necessitates a preliminary finding that the plaintiff was in fact contributorily negligent.").

73. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 33.002 (Vernon Supp. 2006) (providing for proportionate responsibility in all tort actions); TEX. LAB. CODE ANN. § 406.033 (Vernon 2006) (controlling actions against nonsubscribers). Of course some, including Ms. Keng, have argued that § 33.002(c)(1) exempts nonsubscriber cases from the application of Chapter 33. *Keng*, 23 S.W.3d at 352 ("Suits that fall under [section 33.002(c)(1)] are expressly exempted from the comparative-responsibility statute's purview. . . . Kroger argues that because a claim against a nonsubscriber is not an action to collect workers' compensation benefits, [proportionate responsibility] applies automatically.").

74. *See Keng*, 23 S.W.3d at 351 (indicating that the legislature had the chance to amend section 406.033 but declined to do so); *see also* TEX. GOV'T CODE ANN. § 323.007 (Vernon 2005) (noting that "[t]he purpose of the [statutory revision] program is to clarify

argument that a nonsubscribing employer is prohibited from proving that its employee was negligent ignores well-settled precedent in Texas: a nonsubscribing employer has always been allowed to plead and prove that its employee was negligent and the sole proximate cause of the claimed damages.[75]

Furthermore, the court's reliance on *Nootsie* presumes several things: first, that there is, in fact, a conflict between section 406.033 and Chapter 33; second, that contributory negligence and proportionate responsibility amount to the same thing; and third, that one statute's interests need preserving at the expense of the other.[76] This rationale presumes the points that are in contention in this Article. Those points are that section 406.033 and Chapter 33 are not in conflict with one another, that contributory negligence and proportionate responsibility are not the same thing, and that neither of these statutes needs to be preserved at the expense of the other.

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and simplify the statutes[,] and to make the statutes more accessible, understandable, and usable. . . . When revising a statute the council may not alter the sense, meaning, or effect of the statute"). Therefore, it should make no difference which "code" a given statute happens to be assigned to the process of codification.

75. Najera v. Great Atl. Pac. Tea Co., 146 Tex. 367, 207 S.W.2d 365, 367 (1948) (holding that a finding "of sole proximate cause would have prevented a recovery"); Skiles v. Jack in the Box, Inc., 170 S.W.3d 173, 184 (Tex. App.—Dallas 2005, no pet.) ("A nonsubscriber employer is entitled to the defense of sole proximate cause."); Brookshire Bros., Inc. v. Wagnon, 979 S.W.2d 343, 347 (Tex. App.—Tyler 1998, pet. denied) ("[T]he employer's only defense may be that it was not negligent in causing the injury or that its employee was the sole proximate cause of the injury."); Holiday Hills Ret. & Nursing Ctr. v. Yeldell, 686 S.W.2d 770, 775 (Tex. App.—Fort Worth 1985), ("Under a plain reading of this statute, any negligence of the plaintiff which was not the sole proximate cause of his injury would avail the employer nothing.") *rev'd on other grounds*, 701 S.W.2d 243 (Tex. 1985); Tex. Farm Prods. Co. v. Stock, 657 S.W.2d 494, 502 (Tex. App.—Tyler 1983, writ ref'd n.r.e.) ("[N]egligence of the injured worker which is the *sole* proximate cause of his injuries defeats his recovery."); Hernandez v. Malakoff Fuel Co., 109 S.W.2d 356, 357 (Tex. Civ. App.—Dallas 1937, writ dism'd) ("While said section 1 of article 8306 denied to appellee the right to defend under the doctrine of contributory negligence, it does not deny to appellee the right to plead and prove that appellant's injuries were solely caused by his own negligent acts.").

76. *See* Kroger Co. v. Keng, 23 S.W.3d 347, 351-52 (presuming that Chapter 33 must yield to section 406.033, linking contributory negligence and proportionate responsibility by requiring the former as a prerequisite for the latter, and preserving the needs of the workers' compensation statute by precluding the use of contributory negligence as a defense).

Essentially, in *Keng*, the Texas Supreme Court decided to protect the penalty tied to nonsubscription.[77] The *Keng* Court perceived the penalty to be in jeopardy by the application of the proportionate liability scheme.[78] The court, however, ignored the fault-based policy interest protected by Texas's proportionate responsibility scheme.[79] According to *Keng*, the purpose of proportionate responsibility is to avoid the harsh results of contributory negligence.[80] But, as discussed above, the policy inherent in proportionate responsibility has evolved beyond its historical justification. Taking proportionate responsibility's broader policy interest into account, the court could easily have rationalized the opposite result.

## IV. THE STATUTORY ARGUMENT NOT ADDRESSED BY *KENG*

All that being said, however, *Keng* is the law in the state of Texas.[81] *Keng* is a unanimous decision and does not appear to have generated much controversy.[82] But neither *Keng*'s holding nor its rationale addresses whether a nonsubscribing employer may assert proportionate responsibility in a case involving other indepen-

77. *Id.* at 352 (stating that "we cannot conclude that in 1973, when the [l]egislature enacted the statutory comparative-negligence scheme, it intended to repeal by implication section 406.033's bar against nonsubscribing employers relying on an employee's negligence as a defense").

78. *Id.*

79. *See, e.g.*, F.F.P. Operating Partners, L.P. v. Duenez, 50 Tex. Sup. Ct. J. 102, 108-10, 2006 WL 3110426 (Tex. Nov. 3, 2006) (holding that the court is "constrained to faithfully apply the [l]egislature's statutory proportionate responsibility scheme," that "[i]t is a fundamental tenet of tort law that an entity's liability arises from its own injury-causing conduct," that "[t]he broad coverage of the proportionate responsibility statute to tort claims is persuasive," and that "[t]he legislature seemed intent on creating a general scheme of proportionate responsibility, subject to specific statutory exclusions").

80. *See* Kroger Co. v. Keng, 23 S.W.3d 347, 350 (Tex. 2000) (noting that "[t]he [l]egislature enacted the statutory framework for comparative negligence in 1973 to abolish the harsh effect of a contributory-negligence finding").

81. *See, e.g.*, Lubbock County v. Trammel's Lubbock Bail Bonds, 80 S.W.3d 580, 585 (Tex. 2002) (holding that "[g]enerally, the doctrine of stare decisis dictates that once the [Texas] Supreme Court announces a proposition of law, the decision is considered binding precedent").

82. *See generally Keng*, 23 S.W.3d at 347. As of this writing, the authors are aware of no decisions, or even articles, that criticize *Keng*.

dently liable defendants.[83] In fact, *Keng* expressly declined to answer this question.[84]

In the appellate case that gave rise to the Texas Supreme Court's opinion in *Keng*, the Tyler Court of Appeals held that section 33.002(c)(1) of the Texas Civil Practice and Remedies Code affirmatively precludes application of the comparative responsibility scheme in nonsubscriber cases.[85] That provision provides: "This chapter does not apply to: (1) Any action to collect workers' compensation benefits under the workers' compensation laws of this state . . . or actions against an employer for exemplary damages arising out of the death of an employee."[86] Essentially, the argument is that a negligence lawsuit against a nonsubscribing employer is "an action to collect workers' compensation benefits under the workers' compensation laws of this state."[87] The supreme court, however, wisely refrained from addressing this argument.[88] This argument is untenable for two reasons: (1) the statute's express language; and (2) the legislature's intent.

First, the express language in the Workers' Compensation Act is clear—a negligence action against a nonsubscriber defendant is *not* an action to collect workers' compensation benefits under the Texas Labor Code.[89] The legislature defines a "benefit" under the Act as "a medical benefit, an income benefit, a death benefit, or a burial benefit based on a compensable injury."[90] A "compensable injury," in turn, is defined as an injury that "arises out of and in the

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83. *Id.* at 347-48 (describing that this case only involves a plaintiff-employee and a nonsubscriber defendant).

84. *See generally id.* at 352 ("[I]n resolving whether the comparative-responsibility statute applies in [a] nonsubscriber case, we need not determine, as Kroger urges, whether a suit under section 406.033 is 'an action to collect workers' compensation benefits under the workers' compensation laws of this state.'").

85. Kroger Co. v. Keng, 976 S.W.2d 882, 891 (Tex. App.—Tyler 1998), *aff'd*, 23 S.W.3d 347 (Tex. 2000).

86. TEX. CIV. PRAC. & REM. CODE § 33.002(c)(1) (Vernon Supp. 2006).

87. *Kroger Co.*, 976 S.W.2d at 891 (concluding that "when an employee files suit against a nonsubscribing employer, that suit is 'an action to collect benefits [and damages] under the workers' compensation laws of Texas'").

88. *See Keng*, 23 S.W.3d at 352 (refusing to determine the applicability of section 33.022(c)(1)).

89. *See generally* TEX. LAB. CODE ANN. §§ 401.011(5), (6), (10), 406.002(b), 406.031(a)(1), 406.033 (Vernon 2006) (explaining the requirements for application of the title to employers).

90. *Id.* § 401.011(5) (Vernon 2006).

course and scope of employment for which compensation is payable under [the Workers' Compensation Act]."[91] Compensation is payable under the Act if "at the time of injury, the employee is subject to this subtitle."[92] Employees working for nonsubscribers are not "subject to this subtitle" as made clear by section 406.002(b), which provides that an employer is subject to the Act only if it "elects to obtain coverage."[93]

Second, section 406.033 encompasses actions by injured employees to "recover damages for *personal injuries or death.*"[94] The legislature expressly chose to omit any reference to *benefits* or *compensable injuries* within section 406.033.[95] Ignoring the legislature's decision to distinguish such claims against subscribers (for benefits for compensable injuries) from those against nonsubscribers (for personal injuries or death) violates "the fundamental rule that [courts] are to give effect to 'every sentence, clause, and word of a statute so that no part thereof [will] be rendered superfluous.'"[96]

The legislature's decision to distinguish such claims against subscribers for workers' compensation benefits is consistent with the supreme court's decision in *Texas Mexican Railway Co. v.*

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91. *Id.* § 401.011(10) (Vernon 2006).

92. *Id.* § 406.031(a)(1) (Vernon 2006).

93. *Id.* § 406.002(b) (Vernon 2006).

94. TEX. LAB. CODE ANN. § 406.033(a) (Vernon 2006) (emphasis added).

95. *See* Morrison v. Chan, 699 S.W.2d 205, 208 (Tex. 1985) (recognizing a presumption of intent where words are excluded from a statute—"[e]very word excluded from a statute must be presumed to have been excluded for a reason"); Gables Realty Ltd. P'ship v. Travis Cent. Appraisal Dist., 81 S.W.3d 869, 873 (Tex. App.—Austin 2002, pet. denied) ("Further, we should read every word, phrase, and expression in a statute as if it were deliberately chosen, and presume the words excluded from the statute are done so purposefully."); *In re* M.J.M.L., 31 S.W.3d 347, 354 (Tex. App.—San Antonio 2000, pet. denied) ("[I]t is a well established canon of statutory construction that every word excluded from a statute is presumed to be excluded for a purpose."); Renaissance Park v. Davila, 27 S.W.3d 252, 257 (Tex. App.—Austin 2000, no pet.) ("The court must presume that every word in a statute has been used for a purpose and that every word excluded was excluded for a purpose.").

96. F.F.P. Operating Partners, L.P. v. Duenez, 47 Tex. Sup. Ct. J. 1068, 1073, 2004 WL 1966008 (Tex. Sept. 3, 2004), *overruled by* F.F.P. Operating Partners, L.P. v. Duenez, 50 Tex. Sup. Ct. J. 102, 2006 WL 3110426 (Tex. Nov. 3, 2006) (quoting City of San Antonio v. City of Boerne, 111 S.W.3d 22, 29 (Tex. 2003)); *see* Spence v. Fenchler, 107 Tex. 443, 180 S.W. 597, 601 (1915) ("It is an elementary rule of construction that, when possible to do so, effect must be given to every sentence, clause, and word of a statute so that no part thereof be rendered superfluous or inoperative."); Crary v. Port Arthur Channel & Dock Co., 92 Tex. 275, 47 S.W. 967, 970 (1898) (discussing the importance of statutory language).

*Bouchet*,[97] wherein the court held that the provisions of the workers' compensation statutes simply do not apply unless the employer is a subscriber.[98] In *Bouchet,* the plaintiff brought an action against his former employer, a nonsubscriber, alleging retaliatory discharge under the Texas Workers' Compensation Act.[99] The supreme court noted that the legislative history of the anti-retaliation provision of the workers' compensation statute indicated that its purpose was "to protect persons who bring [w]orkmen's [c]ompensation claims or testify in such actions."[100] Based upon this legislative history, the supreme court stated "there can be no doubt that only employees of subscribers to the Act can bring workers' compensation claims."[101]

If only employees of subscribers to the Act can bring workers' compensation claims, it is axiomatic that claims by employees against nonsubscribers cannot be workers' compensation claims. Additionally, if a nonsubscriber is not subject to the anti-retaliation provisions of the workers' compensation statute, which expressly prohibits discrimination against an employee because the employee has "instituted or caused to be instituted in good faith a proceeding," then section 33.002(c)(1), which expressly applies to "[a]n action to collect workers' compensation benefits under the workers' compensation laws of this state," also should not apply to nonsubscribers.[102]

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97. 963 S.W.2d 52 (Tex. 1998).

98. Tex. Mex. Ry. Co. v. Bouchet, 963 S.W.2d 52, 56 (Tex. 1998) ("Because the [l]egislature stated article 8307c was intended to protect 'persons who bring [w]orkmen's [c]ompensation claims,' only subscribers can be subject to article 8307c claims.").

99. *Bouchet*, 963 S.W.2d at 54.

100. *Id.* at 56 (quoting HOUSE COMM. ON JUDICIARY, BILL ANALYSIS, Tex. H.B. 113, 62d Leg. R.S. (1971)) (internal quotation marks omitted).

101. *Id.*; *see also* City of LaPorte v. Barfield, 898 S.W.2d 288, 293 (Tex. 1995) ("Forbidding retaliation against an employee for seeking monetary benefits under the Worker's Compensation [Act] presupposes that the employer is a subscriber.").

102. TEX. CIV. PRAC. & REM. CODE ANN. § 33.002(c)(1) (Vernon Supp. 2006); TEX. LAB. CODE ANN. § 451.001(3) (Vernon 2006).

## V. Comparative Responsibility in Nonsubscriber Cases Involving Other Independently Liable Defendants

*Keng* did not address a controversy that involves other independently liable defendants.[103] Furthermore, its rationale does not preclude application of the proportionate responsibility scheme to such cases.[104] The primary holding of *Keng* is that section 406.033 precludes a nonsubscribing employer from proving its *employee* is negligent.[105] While that rationale may be debatable, neither section 406.033 nor *Keng* precludes a nonsubscribing employer from proving that some party *other than its employee* is negligent and a cause of its employee's injuries.[106] Additionally, neither section 406.033 nor *Keng* prevents an injured employee from seeking relief from *other independently liable defendants*.[107] In fact, the proportionate responsibility provisions of Chapter 33 must be applied to such multi-defendant cases.[108]

Consider the scenario in which a plaintiff-employee sues his nonsubscribing employer and another independently liable defendant. Unquestionably, the plaintiff has the right to do this. It may be desirable from the plaintiff's standpoint to sue the independently liable defendant.[109] Similarly, however, the independently liable defendant also has the right to assert proportionate responsibility

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103. Kroger Co. v. Keng, 23 S.W.3d 347, 347 (Tex. 2000) (describing that this action was between only an employee and a nonsubscriber).

104. *See generally id.* (lacking any discussion of applicability to comparative negligence of an independently liable third party).

105. *See id.* at 351-52 (holding that section 406.033 precludes a finding of common-law negligence, thus prohibiting statutory comparative responsibility).

106. *See generally id.* at 347 (Tex. 2000) (failing to discuss comparative negligence of an independently liable third party).

107. *See generally* TEX. LAB. CODE ANN. § 406.033 (Vernon 2006) (referring only to actions against nonsubscribers for personal injuries or death); *Keng*, 23 S.W.3d at 350 (explaining the application of a penalty provision of a statute where employers opt out of insurance, resulting in employees retaining their common-law rights).

108. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 33.002 (Vernon Supp. 2006) (requiring that proportionate responsibility scheme be applied except as stated); F.F.P. Operating Partners, L.P. v. Duenez, 50 Tex. Sup. Ct. J. 102, 106-107, 2006 WL 3110426 (Tex. Nov. 3, 2006).

109. *Cf.* TEX. CIV. PRAC. & REM. CODE ANN. § 33.003(a) (Vernon Supp. 2006) (requiring determination of percentage of fault regarding each claimant and defendant).

under Chapter 33.[110] This means that the independently liable defendant is entitled to have its responsibility compared with that of the nonsubscribing employer.[111] Furthermore, the independently liable defendant is entitled to prove the plaintiff's responsibility, if any, for his own injuries.[112]

Neither section 406.033 nor *Keng* compel a different result where it is the nonsubscribing employer that is asserting rights under Chapter 33 against *another party* who is responsible for the plaintiff's injuries.[113] In 1995, the Texas Legislature amended Chapter 33 of the Texas Civil Practice and Remedies Code to allow defendants to join "responsible third parties" to protect the policy interest behind Texas's fault-based liability scheme.[114] Those rights were expanded even further in 2003.[115] Once a responsible third party is joined, however, the practical result is the same.[116] The responsible third party is entitled to assert and prove that both the nonsubscribing employer and plaintiff are responsible, or partly responsible, for the injury.[117] Of course, the practical effect of applying proportionate responsibility to such multi-defendant cases is that the nonsubscribing employer may benefit from the plaintiff's fault.[118] There is only one hundred percent of responsibility to be shared among the parties. If the plaintiff is found partially respon-

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110. *Cf. id.* §§ 33.003(a), 33.004(a) (Vernon Supp. 2006) (discussing the right to have percentage of fault determined and a defendant's right to designate a responsible third party via motion for leave).

111. *See id.* § 33.003(a) (Vernon Supp. 2006) (requiring trier of fact to determine the percentage of responsibility of each defendant).

112. *See id.* § 33.003(a)(2) (Vernon Supp. 2006) (sanctioning determination of each claimant's percentage of responsibility in causing the harm for which recovery is sought).

113. *See id.* §§ 33.001, 33.012(a) (Vernon 1997 & Supp. 2006) (validating proportionate responsibility scheme where a claim falls under Chapter 33); Kroger Co. v. Keng, 23 S.W.3d 347, 347-48 (Tex. 2000) (asserting section 33.001 coverage in an attempt to submit a proportionate responsibility question to the jury).

114. *See* Act of May 4, 1995, 74th Leg., R.S., ch. 136, § 1, sec. 33.004, 1995 Tex. Gen. Laws 971, 972 ("[A] defendant may seek to join a responsible third party who has not been sued by the claimant.").

115. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 4.04, sec. 33.004, 2003 Tex. Gen. Laws 855, 855-56 (allowing defendant to designate a responsible third party even where claimant has sued that third party individually).

116. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 33.003(a) (Vernon Supp. 2006) (sanctioning a determination of the percentage of responsibility for injuries sustained).

117. *Id.*

118. *Cf. id.* § 33.001 (Vernon 1997) (denying recovery to claimants more than fifty percent responsible for injuries); *id.* § 33.003(a) (Vernon Supp. 2006) (providing for a determination of the percentage of responsibility between all defendants).

sible for his own damages, then the nonsubscribing employer's responsibility will naturally be reduced.[119]

Since *Keng*, no decision has squarely addressed a situation involving an employee-plaintiff, a nonsubscribing employer, and another independently liable defendant. One case, however, did involve multiple defendants, but the facts of that case were unusual in that both of the defendants were nonsubscribing employers.[120] In *Coronado v. Schoenmann Produce Co.*,[121] the court held that there could not be joint liability between co-employers because liability for breach of the duty to provide a reasonably safe workplace rested with the employer that had the right to control the details of the employees' work.[122] In reaching its conclusion, the *Coronado* Court oversimplified *Keng* when holding that proportionate responsibility rules "do not apply to nonsubscribers in an employee's negligence action because they are barred from asserting comparative responsibility."[123] At best, this statement was dicta in that the discussion concerned whether the "joint employer" doctrine applied as between two nonsubscribing employers.[124] Furthermore, the Texas Supreme Court ultimately rejected this conclusion.[125] Certainly, *Coronado* does not constitute any authority regarding the arguments concerning additional independently liable defendants.

## VI. THE IMPLICATIONS OF *DUENEZ*

*Duenez* supports the proposition that proportionate responsibility should be applied, as written, to nonsubscriber cases involving

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119. *See id.* § 33.012(a) (Vernon Supp. 2006) ("[T]he court shall reduce the amount of damages . . . by a percentage equal to the claimant's percentage of responsibility.").

120. Coronado v. Schoenmann Produce Co., 99 S.W.3d 741, 744-45 (Tex. App.—Houston [14th Dist.] 2003, pet. denied), *overruled by* Wingfoot Enter. v. Alvarado, 111 S.W.3d 134 (Tex. 2003).

121. 99 S.W.3d 741, 758 (Tex. App.—Houston [14th Dist.] 2003, pet. denied), *overruled by* Wingfoot Enter. v. Alvarado, 111 S.W.3d 134 (Tex. 2003).

122. *See id.* at 757 (declaring "the [plaintiff] failed to present any evidence . . . that Schoenmann had the right to control the details of [the plaintiff's] work . . . at the time of the accident").

123. *Id.* at 752.

124. *See id.* at 747, 752-53 (limiting the scope of the opinion to Coronado's joint-employer-doctrine theory).

125. *See* Wingfoot Enter. v. Alvarado, 111 S.W.3d 134, 149 (Tex. 2003) (refusing to reconcile the Workers' Compensation Act with the principle that "there can be only one employer for workers' compensation purposes").

additional independently liable defendants.[126] *Duenez* involves another alleged conflict between the interests protected by proportionate responsibility and those of another statutory scheme—the Texas Dram Shop Act (Dram Shop Act).[127] In *Duenez*, unlike in *Keng*, the court held that the policy of fault-based responsibility protected by Chapter 33 trumps those interests protected by the Dram Shop Act.[128]

The plaintiffs in *Duenez* were injured by a drunk driver who had purchased alcohol from the convenience store defendant.[129] Following the accident, the plaintiffs brought suit under the Dram Shop Act against the owner of the convenience store who, in turn, asserted a cross claim against the driver.[130] The trial court rejected the defendant's request for a submission on the intoxicated driver's percentage of responsibility for apportionment.[131] "The trial court then severed [defendant] F.F.P.'s cross-action against [defendant] Ruiz, leaving F.F.P. as the only defendant for trial."[132] The appeals court affirmed, holding that the proportionate responsibility statute did not apply to Dram Shop Act cases in which the injured plaintiff is an innocent third party.[133]

The supreme court had trouble reaching its ultimate decision in *Duenez*.[134] The court issued its first opinion, a five to four decision over a vigorous dissent, in September 2004.[135] Rehearing was granted, the case was reargued, the court's first opinion was with-

126. *See* F.F.P. Operating Partners, L.P. v. Duenez, 50 Tex. Sup. Ct. J. 102, 109, 2006 WL 3110426 (Tex. Nov. 3, 2006) (noting that proportionate responsibility should be applied broadly to tort actions).

127. *Id.* at 103-10.

128. *Id.* at 108 ("Even if this [c]ourt were to agree with the court of appeals that holding a provider vicariously liable for a patron's intoxication may be a legitimate public policy, we would still be constrained to faithfully apply the [l]egislature's statutory proportionate responsibility scheme.").

129. *Id.* at 102.

130. *Id.*

131. *See Duenez*, 50 Tex. Sup. Ct. J. at 103 (finding that the proportionate responsibility statute did not apply in this case).

132. *Id.* at 102-03.

133. *Id.* at 103.

134. *See* F.F.P. Operating Partners, L.P. v. Duenez, 47 Tex. Sup. Ct. J. 1068, 2004 WL 1966008 (Tex. Sept. 3, 2004), *overruled by* 50 Tex. Sup. Ct. J. 102, 2006 WL 3110426 (Tex. Nov. 3, 2006) (rehearing of the court's first decision was granted).

135. *Id.*

drawn, and the current opinion of the court was handed down in November 2006.[136]

Both opinions concur on one critical point: proportionate responsibility applies to all tort claims unless expressly excluded.[137] Thus, in both opinions, the supreme court held that the court of appeals erred in holding that proportionate responsibility does not apply to the Dram Shop Act.[138]

The two opinions differ, however, in how proportionate responsibility should be applied and whether that application permitted the trial court to sever the cross-claim against Ruiz. In its first opinion, the court deferred to the "imputed liability" of the provider for the acts of its intoxicated patron.[139] The first opinion modified application of Chapter 33 to accommodate this concern and held that the trial court did not reversibly err in severing the case, because the jury could still compare the responsibility of the patron and the provider in the severed action.[140] Effectively, as the dissenters in the first *Duenez* opinion pointed out, the court did not apply Chapter 33 as written, but rather held that the provider was automatically jointly and severally liable for the acts of the intoxicated patron; the provider is left with no more than what amounts to a cross-claim for contribution.[141] In contrast, in its pre-

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136. *See Duenez*, 50 Tex. Sup. Ct. J. at 102 (providing the current opinion of the court).

137. *See Duenez*, 50 Tex. Sup. Ct. J. at 106-07, 110 ("The [l]egislature seemed intent on creating a general scheme of proportionate responsibility, subject to specific statutory exclusions."); *Duenez*, 47 Tex. Sup. Ct. J. at 1070 ("It is clear from Chapter 33's language that the [l]egislature intended all causes of action based on tort, unless expressly excluded, to be subject to apportionment.").

138. F.F.P. Operating Partners, L.P. v. Duenez, 50 Tex. Sup. Ct. J. 102, 111, 2006 WL 3110426 (Tex. Nov. 3, 2006); *Duenez*, 47 Tex. Sup. Ct. J. at 1073.

139. *See Duenez*, 47 Tex. Sup. Ct. J. at 1072 (stating "a party to whom liability is imputed and who is also independently liable 'is responsible for the share of the verdict assigned to [the party whose liability is imputed]' ").

140. *See id.* at 1073 ("[B]ecause F.F.P. is responsible to the Duenezes for its own percentage of liability and that of Ruiz, and because there is nothing that would prevent a jury from fairly apportioning responsibility between F.F.P. and Ruiz in the severed action, the trial court's severance order did not constitute reversible error.").

141. *Compare id.* at 1072 (relegating provider to contribution claim after the injured party fully recovers from provider), *with id.* at 1074 (Owen, J., joined by Hecht, Wainwright, & Brister, JJ., dissenting) ("[A]lthough the [c]ourt says proportionate responsibility applies to causes of action under the Dram Shop Act, that is not the [c]ourt's actual holding."). Contribution claims differ from proportionate responsibility claims. *Cf.* City of San Antonio v. Johnson, 103 S.W.3d 639, 642 (Tex. App.—San Antonio 2003, pet. denied) ("A contribution claim is not a separate cause of action but is a method of determining each

sent opinion, the supreme court holds that Chapter 33 should be applied as it is unambiguously written—the responsibility of the provider and patron should be compared, and the provider is only liable for its percentage responsibility (unless it is found more than fifty percent responsible, in which case it is jointly and severally liable for all of the plaintiffs' damages).[142]

What is more interesting and important is the rationale behind these differing results. Both opinions weigh the policies and interests protected by the Dram Shop Act and the proportionate responsibility scheme.[143] In its first opinion, the court found a debatable[144] conflict between the interests protected by the Dram Shop Act and proportionate responsibility, but concluded by favoring those interests protected by the Dram Shop Act.[145] In its present opinion, the court weighs the same interests, and yet protects those interests of the proportionate responsibility scheme.[146]

The court's present, and presumably final, opinion in *Duenez* directly undermines the court's rationale in *Keng*. In *Keng*, just as in the first *Duenez* opinion, the court cited a debatable conflict between another statutory scheme and proportionate responsibility, and favored the policy protected by the Workers' Compensation Act at the expense of proportionate responsibility.[147] The court, in

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defendant's liability with regard to a claim. A defendant's claim of contribution is derivative of the plaintiff's right to recover from the joint defendant against whom contribution is sought"); "Y" Propane Serv., Inc. v. Garcia, 61 S.W.3d 559, 570 n.1 (Tex. App.—San Antonio 2001, no pet.) (discussing contribution claims against other defendants); H. M. R. Constr. Co. v. Wolco of Houston, Inc., 422 S.W.2d 214, 217 (Tex. Civ. App.—Houston [14th Dist.] 1967, writ ref'd n.r.e.) ("[T]he rights and duties of contribution arise in the absence of any contract where there is a common liability of two or more parties to another party.").

142. *See Duenez*, 50 Tex. Sup. Ct. J. at 111 (holding that providers should only be responsible for their own conduct).

143. *Compare Duenez*, 47 Tex. Sup. Ct. J. at 1072 (fearing that proportionate responsibility scheme would render dram shop plaintiff's remedy "meaningless" regarding insolvent defendants), *with Duenez*, 50 Tex. Sup. Ct. J. at 108-10 (favoring the interests protected by proportionate responsibility over those protected by the Dram Shop Act).

144. *Compare Duenenz*, 50 Tex. Sup. Ct. J. at 105-06 (discussing and rejecting the dissenters' view of the purported conflict created by the language of the Dram Shop Act), *with Duenez*, 47 Tex. Sup. Ct. J. at 1072 (advancing similar interpretations of the Dram Shop Act).

145. *Duenez*, 47 Tex. Sup. Ct. J. at 1072 (believing that proportionate responsibility would render the Dram Shop Act "meaningless").

146. *Duenez*, 50 Tex. Sup. Ct. J. at 103-10.

147. *Compare* Kroger Co. v. Keng, 23 S.W.3d 347, 350-51 (Tex. 2000) (refusing to allow the comparative negligence scheme to "lessen the penalty imposed on employers

rejecting its rationale behind the first *Duenez* opinion, now effectively rejects arguments that are conceptually very similar to those supporting the court's opinion in *Keng*.[148] *Duenez* makes very clear that the fault-based policy protected by proportionate responsibility is to be given great weight and should not be ignored—as it essentially was in *Keng*.[149]

In some ways, the only practical difference between *Keng* and *Duenez* is which policy interest benefits from the presumption of protection.[150] In *Keng* and in the preliminary opinion in *Duenez*, the policy protected by proportionate responsibility loses.[151] But in both cases, the decisions create conflicts where, arguably, none exist. In *Keng*, there is only a conflict if one accepts two questionable propositions: (1) contributory negligence and proportionate responsibility amount to the same thing[152] (which is not true); and (2)

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who choose not to subscribe to workers' compensation insurance"), *with* F.F.P. Operating Partners, L.P. v. Duenez, 47 Tex. Sup. Ct. J. 1068, 1072, 2004 WL 1966008 (Tex. Sept. 3, 2004), *overruled by* 50 Tex. Sup. Ct. J. 102, 2006 WL 3110426 (Tex. Nov. 3, 2006) (fearing that proportionate responsibility scheme would render dram shop plaintiff's remedy "meaningless" regarding insolvent defendants). The debatable nature of the alleged conflict between the Workers' Compensation Act and the proportionate responsibility scheme is discussed above in footnotes 74-80.

148. *See Duenez*, 50 Tex. Sup. Ct. J. at 103-06 (holding that proportionate responsibility should have broad coverage).

149. *Compare id.* at 108-10 (holding that the court is "constrained to faithfully apply the [l]egislature's statutory proportionate responsibility scheme[,]" that "it is a fundamental tenet of tort law that an entity's liability arises from its own injury-causing conduct[,]" and that "[t]he broad coverage of the proportionate responsibility statute to tort claims is persuasive." Additionally, "[t]he [l]egislature seemed intent on creating a general scheme of proportionate responsibility, subject to specific statutory exclusions"), *with Keng*, 23 S.W.3d at 350 (explaining that the primary policy purpose behind comparative responsibility was to mitigate the harsh results of the doctrine of contributory negligence).

150. *Compare Keng*, 23 S.W.3d at 350 (eliminating harsh effect of contributory negligence where employers opted out of the system), *with Duenez*, 50 Tex. Sup. Ct. J. at 108 (confirming that by enacting the proportionate responsibility scheme, "the [l]egislature made the policy decision that an innocent third party, suing the intoxicated patron and the dram shop, could be burdened with the risk of a joint tortfeasor's insolvency[,]" because "[a] tortfeasor who was found less than fifty-one percent responsible does not have to pay the entire amount of damages, only his or her proportionate share").

151. *See Keng*, 23 S.W.3d at 351 ("It follows that by expressly precluding employers from relying on common-law contributory negligence, section 406.033 effectively prohibits an employer from relying on the statutory comparative-responsibility defense."); *see also Duenez*, 47 Tex. Sup. Ct. J. at 1072, *overruled by* 50 Tex. Sup. Ct. J. 102, 2006 WL 3110426 (Tex. Nov. 3, 2006) (requiring solvent defendant to recover from other defendants after paying aggregated damages to plaintiff).

152. *See Keng*, 23 S.W.3d 347 at 351 (categorizing contributory negligence as an essential element of comparative responsibility).

the inability of a nonsubscriber to prove its employee was negligent when, in fact, the courts have long held that a nonsubscribing employer can prove its employee's negligence was the sole proximate cause of his injuries.[153] Given the shaky foundation of *Keng*'s rationale, the logical course of action may well be to revisit the decision altogether. By citing *Duenez*, the court could justify the opposite result in *Keng* simply by emphasizing the fault-based policies protected by proportionate responsibility as opposed to those protected by section 406.033.[154]

## VII. CONCLUSION

Regardless of whether *Duenez* ultimately results in a reversal of *Keng*, proportionate responsibility should still be applied to nonsubscriber cases involving other independently liable defendants.[155] *Keng* wisely declined to embrace (or address) the only argument that might expressly exclude nonsubscriber cases involving other independently liable defendants from the provisions of Chapter 33.[156] Furthermore, nothing about *Keng*'s rationale would preclude application of proportionate responsibility to such cases,[157] and *Duenez* disposes of any argument that proportionate responsibility does not otherwise apply.[158] Therefore, following the example of *Duenez*, proportionate responsibility should be applied in nonsubscriber cases involving other independently liable defendants.

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153. *See id.* at 351-52 (asserting that contributory negligence is an essential element of comparative negligence and allowing submission regarding employee's negligence as sole proximate cause).

154. *Duenez*, 50 Tex. Sup. Ct. J. at 108-10 (holding that the court is "constrained to faithfully apply the [l]egislature's statutory proportionate responsibility scheme"). Additionally, the court stated that "it is a fundamental tenet of tort law that an entity's liability arises from its own injury-causing conduct," and that "[t]he broad coverage of the proportionate responsibility statute to tort claims is persuasive." F.F.P. Operating Partners, L.P. v. Duenez, 50 Tex. Sup. Ct. J. 102, 108-10, 2006 WL 3110426 (Tex. Nov. 3, 2006). Furthermore, "[t]he legislature seemed intent on creating a general scheme of proportionate responsibility, subject to specific statutory exclusions." *Id.*

155. *See id.* at 106-07 (citing the proportionate responsibility scheme and holding that that its provisions apply to all tort actions except those expressly excluded).

156. *Keng*, 23 S.W.3d at 352.

157. *Id.* at 347-48 (describing that this case only involves a plaintiff-employee and a nonsubscriber defendant).

158. *See Duenez*, 50 Tex. Sup. Ct. J. at 106-07 (finding that the proportionate responsibility scheme applies unless expressly excluded).