

IN THE SUPREME COURT OF TEXAS

No. 99-1227

GRAPEVINE EXCAVATION, INC., APPELLANT

v.

MARYLAND LLOYDS, A LLOYDS INSURANCE COMPANY, APPELLEE

ON CERTIFIED QUESTION FROM THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

Argued February 16, 2000

JUSTICE BAKER delivered the opinion of the Court, in which JUSTICE ENOCH, JUSTICE ABBOTT, JUSTICE HANKINSON, JUSTICE O'NEILL, and JUSTICE GONZALES joined.

JUSTICE GONZALES filed a concurring opinion, in which JUSTICE ENOCH joined.

CHIEF JUSTICE PHILLIPS filed a dissenting opinion, in which JUSTICE HECHT and JUSTICE OWEN joined.

This case is before the Court on a certified question from the United States Court of Appeals for the Fifth Circuit. The certified question is whether, in a policyholder's successful suit for breach of contract against an insurance company that is subject to one or more of the provisions listed in section 38.006 of the Insurance Code, the insurance company is liable to its policyholder for reasonable attorney's fees incurred in pursuing the breach-of-contract action, either under an Insurance Code provision listed in section 38.006, or under section 38.001 if application of one or

more of those provisions does not result in the award of attorney's fees. 197 F.3d 730, 732 (5th Cir. 1999). We answer the certified question yes.

I. BACKGROUND

Grapevine Excavation, Inc. sued Maryland Lloyds, its insurer, for breach of contract for refusing to defend Grapevine in a lawsuit. A federal district court in Texas concluded that Maryland did not owe Grapevine a duty to defend. *See Federated Mut. Ins. Co. v. Grapevine Excavation, Inc.*, 18 F. Supp. 2d 636 (N.D. Tex. May 22, 1998). Grapevine appealed, and the Fifth Circuit Court of Appeals reversed the trial court's judgment. *See Federated Mut. Ins. Co. v. Grapevine Excavation, Inc.*, 197 F.3d 720 (5th Cir. 1999). It determined that Maryland breached its contract with Grapevine by refusing to defend it in the underlying lawsuit and remanded the case to the district court to determine an appropriate remedy. 197 F.3d at 730. The Fifth Circuit retained jurisdiction for the limited purpose of deciding whether Grapevine is entitled to recover attorney's fees incurred in pursuing the breach-of-contract action against Maryland. The Fifth Circuit certified the question to this Court. 197 F.3d at 732.

II. TEXAS CIVIL PRACTICE AND REMEDIES CODE CHAPTER 38

Chapter 38 generally provides that litigants may recover reasonable attorney's fees incurred in a valid claim based upon a written contract. *See* TEX. CIV. PRAC. & REM. CODE § 38.001(8). But section 38.006 provides an exception to this general rule:

This chapter does not apply to a contract issued by an insurer that is subject to the provisions of:

- (1) Article 3.62, Insurance Code [repealed in 1991];
- (2) Section 1, Chapter 387, Acts of the 55th Legislature, Regular Session, 1957 (Article 3.62-1, Insurance Code) [repealed in 1991];

- (3) Chapter 9, Insurance Code;
- (4) Article 21.21, Insurance Code; or
- (5) The Unfair Claim Settlement Practices Act (Article 21.21-2, Insurance Code).

TEX. CIV. PRAC. & REM. CODE § 38.006.

III. THE FIFTH CIRCUIT'S CERTIFICATION

In its certification to this Court, the Fifth Circuit recognized that it has interpreted section 38.006 differently from Texas appellate courts. 197 F.3d at 731. The court acknowledged that it has interpreted section 38.006, relying on this Court's opinion in *Dairyland County Mutual Insurance Company v. Childress*, 650 S.W.2d 770, 775 (Tex. 1983), to exempt insurers who are subject to the provisions listed in section 38.006 from paying attorney's fees in breach-of-contract actions. *See Bituminous Cas. Corp. v. Vacuum Tanks, Inc.*, 975 F.2d 1130, 1133 (5th Cir. 1992); *see also LaFarge Corp. v. Hartford Cas. Ins. Co.*, 61 F.3d 389, 402-03 (5th Cir. 1995).

In *Dairyland*, this Court held that Dairyland was not exempt under former article 2226 (codified at chapter 38 of the Texas Civil Practice and Remedies Code) from paying attorney's fees because Dairyland was a county mutual insurance company and thus, under former section 17.22 of the Insurance Code, was not subject to any of the exceptions listed under article 2226. *See Dairyland*, 650 S.W.2d at 775. The Fifth Circuit has interpreted our holding in *Dairyland* to imply that "an insurer who falls within the provisions of section 38.006 is exempt from the payment of attorney's fees and that only those insurers who do not qualify for the exemption are subject to the payment of attorney's fees." *Bituminous Cas. Corp.*, 975 F.2d at 1133; *see also Lafarge Corp.*, 61 F.3d at 402.

In contrast to the Fifth Circuit's interpretation, Texas appellate courts have held that section

38.006's purpose is to deny attorney's fees under chapter 38 only when attorney's fees are already available under other specific statutes. See, e.g., *Texas Property & Cas. Ins. Guar. Ass'n v. Southwest Aggregates, Inc.*, 982 S.W.2d 600, 613 (Tex. App.--Austin 1998, no pet.); *Whitehead v. State Farm Mut. Auto. Ins. Co.*, 952 S.W.2d 79, 87-88 (Tex. App.--Texarkana), *rev'd on other grounds*, 988 S.W.2d 744 (Tex. 1999); *Novosad v. Mid-Century Ins. Co.*, 881 S.W.2d 546, 552 (Tex. App.--San Antonio 1994, no writ); *American Gen. Fire & Cas. Co. v. McInnis Book Store, Inc.*, 860 S.W.2d 484, 490-91 (Tex. App.--Corpus Christi 1993, no writ); *Chitsey v. National Lloyd's Ins. Co.*, 698 S.W.2d 766, 772 (Tex. App.--Austin), *aff'd*, 738 S.W.2d 641 (Tex. 1987); *Hochheim Prairie Farm Mut. Ins. Ass'n v. Burnett*, 698 S.W.2d 271, 278 (Tex. App.--Fort Worth 1985, no writ); *Martin v. Travelers Indem. Co.*, 696 S.W.2d 450, 451 (Tex. App.--Dallas 1985, writ ref'd n.r.e.); *State Farm Mut. Auto. Ins. Co. v. Clark*, 694 S.W.2d 572, 574-75 (Tex. App.--Corpus Christi 1985, no writ); *Vanguard Ins. Co. v. McWilliams*, 680 S.W.2d 50, 52 (Tex. App.--Austin 1984, writ ref'd n.r.e.); *Commonwealth Lloyd's Ins. Co. v. Thomas*, 678 S.W.2d 278, 283-84 (Tex. App.--Fort Worth 1984, writ ref'd n.r.e.); *Bellefonte Underwriters Ins. Co. v. Brown*, 663 S.W.2d 562, 575 (Tex. App.--Houston [14th Dist.]), *rev'd in part on other grounds*, 704 S.W.2d 742, 745 (Tex. 1986); *Texas Farmers Ins. Co. v. Hernandez*, 649 S.W.2d 121, 124 (Tex. App.--Amarillo 1983, writ ref'd n.r.e.); *Aetna Fire Underwriters Ins. Co. v. Southwestern Eng'g Co.*, 626 S.W.2d 99, 103 (Tex. App.--Beaumont 1981, writ ref'd n.r.e.); *Prudential Ins. Co. v. Burke*, 614 S.W.2d 847, 850 (Tex. Civ. App.--Texarkana), *writ ref'd n.r.e.*, 621 S.W.2d 596, 597 (Tex. 1981)(per curiam).

IV. THE PARTIES' CONTENTIONS

Grapevine argues that Texas appellate courts have correctly interpreted section 38.006. Grapevine specifically points to this Court's decision in *Burke*, which affirmed the court of appeals'

decision upholding an award of attorney's fees against an insurer in a breach-of-contract action. *See Burke*, 621 S.W.2d at 597. Grapevine also notes that this Court followed *Burke* in *Barnett v. Aetna Life Insurance Company*, 723 S.W.2d 663, 667 (Tex. 1987). Thus, Grapevine asserts that we should answer the certified question affirmatively and allow Grapevine to recover attorney's fees from Maryland.

On the other hand, Maryland insists that section 38.006's plain language exempts insurers from liability for attorney's fees under chapter 38. Maryland relies on *Dairyland* and argues that this Court has only directly considered this issue in *Dairyland*. *See Dairyland*, 650 S.W.2d at 775.

V. ANALYSIS

While we do not disagree with Maryland that section 38.006's language could support its view, we agree with Grapevine that section 38.006, as this Court interpreted it in *Burke* and as numerous Texas courts of appeals decisions have interpreted it over the past twenty years, denies attorney's fees under chapter 38 only if attorney's fees are available under another statutory scheme. We adhere to this precedent and answer the certified question yes.

In 1977, the Legislature amended former article 2226 and provided for attorney's fees on suits founded on written or oral contracts. The amendment exempted insurance contracts issued by insurers that were subject to specific provisions of the Insurance Code listed in article 2226.

This Court issued its *Burke* per curiam in September 1981. *See Burke*, 621 S.W.2d at 596. In *Burke*, the court of appeals specifically considered on rehearing the question certified here and decided that section 38.006 allowed recovery for attorney's fees from insurers in breach-of-contract suits. *See Burke*, 614 S.W.2d at 850. The court of appeals held that the purpose of former article 2226 was "to exclude only those claims against insurance companies where attorney's fees [are]

already available by virtue of other specific statutes.” *Burke*, 614 S.W.2d at 850. Prudential filed an application for writ of error in this Court and raised two issues, one of which was whether it must pay Burke’s attorney’s fees on his breach-of-contract claim. We refused Prudential’s application for writ of error. In a per curiam opinion, we acknowledged the attorney’s fees issue and the other issue and then stated “the Court of Civil Appeals has correctly decided the case.” *Burke*, 621 S.W.2d at 597. We then discussed a collateral issue in the case. *Burke*, 621 S.W.2d at 597. Thus, we affirmed the court of appeals’ holding on the attorney’s fees award.

The Legislature codified article 2226 as chapter 38 in 1985 without substantial change. After the codification, we reaffirmed *Burke* in *Barnett*. *See Barnett*, 723 S.W.2d at 667. In *Barnett*, we held that the insured was entitled to attorney’s fees on its breach-of-contract claim and cited section 38.001. We also cited *Texas Farmers Insurance Company v. Hernandez*, 649 S.W.2d 121 (Tex. Civ. App.--Amarillo 1983, writ ref’d n.r.e.). In *Hernandez*, the court of appeals adopted the *Burke* construction of article 2226 and awarded attorney’s fees to the insured on his successful breach-of-contract suit against his insurer. *See Hernandez*, 649 S.W.2d at 124.

In addition to *Burke* and *Hernandez*, courts of appeals in a number of other cases have held that section 38.006 provides recovery of attorney’s fees from insurers in breach-of-contract actions. *See, e.g., Texas Property & Cas.*, 982 S.W.2d at 612-13; *Whitehead*, 952 S.W.2d at 87-89, *rev’d on other grounds*, 988 S.W.2d at 744; *Novosad*, 881 S.W.2d at 552; *American Gen. Fire & Cas. Co.*, 860 S.W.2d at 490-91; *Chitsey*, 698 S.W.2d at 772, *aff’d*, 738 S.W.2d at 641; *Hochheim Prairie Farm Mut. Ins. Ass’n*, 698 S.W.2d at 278; *Martin*, 696 S.W.2d at 451; *Clark*, 694 S.W.2d at 575; *Vanguard Ins. Co.*, 680 S.W.2d at 52; *Commonwealth Lloyd’s*, 678 S.W.2d at 283-84; *Bellefonte Underwriters*, 663 S.W.2d at 575, *rev’d in part on other grounds*, 704 S.W.2d at 742; *Aetna Fire*

Underwriters, 626 S.W.2d at 103.

On the other hand, the Fifth Circuit has not been so comfortable with section 38.006's meaning. First, in *Bituminous Casualty*, a panel of the court relied on *Dairyland* to hold that an insurer who falls within section 38.006 is exempt from liability for attorney's fees. *See Bituminous Cas.*, 975 F.2d at 1133. In doing so, the panel acknowledged the Texas courts of appeals decisions holding that section 38.006 excluded attorney's fees only in cases where attorney's fees were not otherwise available. *See Bituminous Cas.*, 975 F.2d at 1133. But the panel overlooked our *Burke* per curiam, and also *Barnett*, where we confirmed our holding in *Burke*. *See Bituminous Cas.*, 975 F.2d at 1133; *see also Barnett*, 723 S.W.2d at 667; *Burke*, 621 S.W.2d at 597. Instead, the panel stated that this Court had not "expressly affirmed the decisions in this line of cases" and that we had only expressly considered the issue in *Dairyland*. *Bituminous Cas.*, 975 F.2d at 1133.

Then, in 1995, another Fifth Circuit panel reluctantly followed *Bituminous Casualty* in reversing an attorney's fees award to an insured in a successful breach-of-contract suit. *See Lafarge Corp.*, 61 F.3d at 402-03. The panel suggested that the *Bituminous Casualty* holding may have been erroneous under Texas law, and noted that even Fifth Circuit decisions before and after *Bituminous Casualty* had assumed that attorney's fees awards to insureds were appropriate in breach-of-contract actions. *See Lafarge Corp.*, 61 F.3d at 403 (citing *Gulf Chem. & Metallurgical Corp. v. Associated Metals & Minerals Corp.*, 1 F.3d 365, 373 (5th Cir. 1993) and *Enserch Corp. v. Shand Morahan & Co.*, 952 F.2d 1485, 1500-01 (5th Cir. 1992)). But it also recognized that under Fifth Circuit rules, it was bound by the *Bituminous Casualty* decision:

[I]t is well-settled in this Circuit that one panel may not overrule the decision, right or wrong, of a prior panel, in the absence of an en banc reconsideration or superseding decision of the Supreme Court. Moreover, a prior panel decision should

be followed by other panels without regard to any alleged existing confusion in state law, absent a subsequent state court decision or statutory amendment which makes this Court's [prior] decision *clearly* wrong.

Lafarge Corp., 61 F.3d at 403 (citations and internal quotation marks omitted). The panel noted that the parties had not cited and the court had not found any post-*Bituminous Casualty* Texas appellate court opinion "that *directly* confront[ed] the issue." *Lafarge Corp.*, 61 F.3d at 403.

In the meantime, Texas courts continued to follow *Burke*. See, e.g., *Texas Property & Cas.*, 982 S.W.2d at 612; *Novosad*, 881 S.W.2d at 552; *American Gen. Fire & Cas.*, 860 S.W.2d at 490-91; *Bellafonte Underwriters*, 663 S.W.2d at 575, *rev'd in part on other grounds*, 704 S.W.2d at 742. Given the conflict between Texas case law and *Bituminous Casualty*, and the resulting confusion in the Fifth Circuit, it is not surprising that the Fifth Circuit ultimately certified the question, asking us to pronounce again, this time more directly, our interpretation of section 38.006's meaning.

We conclude that we should follow established and longstanding Texas authority that interprets section 38.006 to allow recovery of attorney's fees in a successful breach-of-contract action against an insurer unless attorney's fees are otherwise available. We reach this decision for two important reasons.

First, although Texas appellate courts have consistently held for nearly twenty years that section 38.006 allows recovery of attorney's fees against insurers in breach-of-contract suits, the Legislature has not substantially changed section 38.006 since its enactment in 1977. Indeed, it codified article 2226 as chapter 38 in 1985 without substantial change. It is a firmly established statutory construction rule that once appellate courts construe a statute and the Legislature re-enacts or codifies that statute without substantial change, we presume that the Legislature has adopted the judicial interpretation. See *Ector County v. Stringer*, 843 S.W.2d 477, 479-80 n.4 (Tex. 1992);

Robinson v. Central Tex. MHMR Ctr., 780 S.W.2d 169, 171 (Tex. 1989); *First Employees Ins. Co. v. Skinner*, 646 S.W.2d 170, 172 (Tex. 1983). Therefore, we presume that the Legislature has adopted the established judicial interpretation of section 38.006.

More importantly, stare decisis demands the result we reach here. Stare decisis has its greatest force in statutory construction cases. *See Moss v. Gibbs*, 370 S.W.2d 452, 458 (Tex. 1963). Adhering to precedent fosters efficiency, fairness, and legitimacy. *See Weiner v. Wasson*, 900 S.W.2d 316, 320 (Tex. 1995). More practically, it results in predictability in the law, which allows people to rationally order their conduct and affairs. *See Weiner*, 900 S.W.2d at 320. And, Texas appellate courts have predictably and consistently given section 38.006 the same construction for the past twenty years.

VI. CONCLUSION

We hold that in a policyholder's successful suit for breach of contract against an insurer that is subject to the provisions listed in section 38.006, the insurer is liable for reasonable attorney's fees incurred in pursuing the breach-of-contract action under section 38.001 unless the insurer is liable for attorney's fees under another statutory scheme. Accordingly, we answer the certified question from the Fifth Circuit Court of Appeals yes.

James A. Baker,
Justice

OPINION DELIVERED: July 6, 2000