

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2001-CA-002656-MR

KENTUCKY FARM BUREAU  
MUTUAL INSURANCE COMPANY

APPELLANT

v. APPEAL FROM CUMBERLAND CIRCUIT COURT  
HONORABLE JAMES G. WEDDLE, JUDGE  
ACTION NO. 00-CI-00039

JANE RADFORD CARY; CHARLOTTE A. BUSH;  
HARLAN JUDD, JR., CO-ADMINISTRATOR  
OF THE ESTATE OF DAVID MICHAEL CARY,  
DECEASED; ANNA D. CARY AND ERIN D. CARY,  
BY AND THROUGH THEIR GUARDIAN  
AND NEXT FRIEND, DOROTHY CARY

APPELLEES

OPINION  
REVERSING  
\*\* \*\* \* \* \* \* \*

BEFORE: HUDDLESTON, PAISLEY, AND TACKETT, JUDGES.

TACKETT, JUDGE: Kentucky Farm Bureau Mutual Insurance Company  
appeals from the denial of its motion for summary judgment in a  
declaration of rights action filed in the Cumberland Circuit  
Court, seeking a declaration that it has no duty to defend Jane  
Radford Cary in an action brought against her by the family of

her late husband, David Michael Cary. Kentucky Farm Bureau Mutual Insurance Company argues on appeal that the Cumberland Circuit Court erred in denying its motion for summary judgment, because there is a valid and enforceable exclusion under the policy which would prevent an action by a member of the insured's family. We agree, and reverse the judgment with directions to enter summary judgment on behalf of Kentucky Farm Bureau (KFB).

Jane Radford Cary shot and killed her husband in their residence on October 8, 1995. She was charged with murder, tried, and acquitted by reason of insanity. Subsequently, her late husband's family filed an action for wrongful death against Cary. Under the homeowner's insurance policy, KFB retained an attorney for Cary in the underlying wrongful death action, while simultaneously filing this action to determine whether it was obligated to provide coverage for Cary under the policy. KFB expressly reserved the right to raise any defenses to coverage. KFB moved for summary judgment on the theory that it was not obligated to provide coverage due to the family exclusion, which prevents a member of the insured's family from bringing an action against the insured under the policy. The court below denied summary judgment, and subsequently amended the order to include language to the effect that the order was a final and appealable order. This appeal followed.

Before we discuss the merits of KFB's appeal, we note that while the denial of a motion for summary judgment is not normally appealable, under circumstances such as this where there are no material facts in dispute and the only basis for the ruling is a matter of law, an exception to that general rule exists. Midwest Mut. Ins. Co. v. Wireman, Ky. App., 54 S.W.3d 177 (2001). We find that the exception outlined in Wireman is applicable here, and therefore shall review the merits of this appeal.

KFB argues on appeal that the family exclusion is a valid and enforceable one in Kentucky, in the context of a homeowner's insurance policy. If held to be enforceable, KFB would have no duty to defend the underlying action or to provide coverage. Cary responds by arguing that the family exclusion was held to be against public policy in Lewis v. West American Ins. Co., Ky., 927 S.W.2d 829 (1996), and that even if the exclusion were enforceable, KFB has waived its right to assert the exclusion.

The holding of Lewis was expressly limited to automobile insurance cases by Kentucky Farm Bureau Mut. Ins. Co. v. Thompson, Ky., 1 S.W.3d 475 (1999). In that case, the Kentucky Supreme Court, considering a farm owner's policy, held the family exclusion to be valid and enforceable. As we are bound to follow the precedent of Thompson, the Lewis case relied

on by appellees is not applicable. The family exclusion in a homeowner's policy is not against public policy, and is therefore valid and enforceable.

Further we are not persuaded that KFB waived its right to assert the exclusion. KFB proceeded with this action under a reservation of rights, and in no way made an express or implied waiver of those rights. Likewise, we see no reason that KFB should be estopped from asserting its defenses now. KFB points out that the underlying action was held in abeyance by agreement of the parties, pending resolution of the criminal charges against Cary. It is at best disingenuous for the appellees to claim that KFB has been sitting on its rights, and should now be estopped from asserting them, when the action was held in abeyance by the agreement of the parties for quite some time. See, Edmonson v. Pennsylvania Nat'l. Mut. Casualty Ins. Co., Ky., 781 S.W.2d 753 (1989). Since no bar exists to the enforcement of the exclusion contained in this policy, the judgment must be reversed.

For the foregoing reasons, the judgment of the Cumberland Circuit Court is reversed with directions to enter judgment in favor of Kentucky Farm Bureau.

ALL CONCUR.

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