

No. 27711—*West Virginia Fire and Casualty Company v. David Mathews*

McGraw, J., dissenting:

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In determining that Mathews did not have coverage for the loss he sustained when his house was inadvertently demolished, the majority makes the mistake of construing the *absence* of coverage for malicious or willful conduct as a necessary limitation on coverage that is otherwise clearly provided under the policy. The mistake in this logic is glaring, since the Court has chosen to ascertain the scope of insurance coverage not by the language of the policy itself,¹ but by a provision that has never been made part of the policy at all (or, at best, a provision which has been rendered inoperative as a result of the policyholder’s choice to deny a certain form of coverage). In effect, the majority treats an otherwise lifeless policy provision—intended to *provide* coverage if certain prerequisites are satisfied—as a *de facto* exclusion. This approach is obviously flawed.

Nor is there anything in the authority relied upon by the majority that supports such an approach. The case and commentary cited by the majority merely state that a “named perils” policy only

¹It has previously been our unremitting practice to interpret insurance contracts based upon the plain meaning of their terms. See syllabus, *Keffer v. Prudential Ins. Co.*, 153 W. Va. 813, 172 S.E.2d 714 (1970) (“Where the provisions of an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended.”); see also syl. pt. 2, *Louk v. Isuzu Motors, Inc.*, 198 W. Va. 250, 479 S.E.2d 911 (1996); syl. pt. 1, *Russell v. State Auto. Mut. Ins. Co.*, 188 W. Va. 81, 422 S.E.2d 803 (1992).

provides those coverages specifically enumerated; they do not take the further step, as has been done here, of limiting extant coverage based upon the absence other forms of overlapping coverage. In my view, the insurance policy in question undeniably covered any damage caused by a “vehicle” (as modified by express exclusions), and the fact that the policy did not specifically indemnify against acts of vandalism or malicious mischief in no way detracted from that coverage.

Moreover, since there is no dispute that the Komatsu excavator which destroyed Mathews’ house moves on tracks, it is a “vehicle” within the commonly understood meaning of such term. *See Random House Webster’s Unabridged Dictionary* 2109 (2d ed. 1998) (defining “vehicle,” *inter alia*, as “a conveyance moving on wheels, runners, *tracks*, or the like, as a cart, sled, automobile, or tractor”) (emphasis added). Consequently, the circuit court erred in granting summary judgment on the issue of whether Mathews’ loss was covered under the policy.

I also see no valid reason for the circuit court to have denied Mathews’ attempt to lodge a cross-claim against Loftis, where such claim was brought within three months of West Virginia Fire’s motion to make Loftis a party.

For the foregoing reasons, I respectfully dissent.