No. 30357— ***Dorothy L. Hawkins and Paul E. Hawkins v. Ford Motor Co., a Delaware Corporation***

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July 3, 2002
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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McGraw, J., concurring:

I concur in the decision reached by the majority because I view this as largely a warranty case. An automobile manufactured by Ford was found by a jury to be defective. While I agree that under the facts of this case Ford was not "in the business of insurance," I write separately to suggest that we may well face a situation someday where the UTPA has broader application. When we examined a similar issue with respect to a self-insured freight company, we noted: "[T]he fact that the legislature permits companies to formulate the most efficient insurance coverage should not be misconstrued as a device to avoid liability by the self-retention of risk." *Jackson v. Donahue*, 193 W. Va. 587, 592, 457 S.E.2d 524, 529 (1995) (citation omitted).

In a later case, we again noted that the Legislature's decision to permit self-insurance was not intended to encourage unfair practices after a claim is filed:

> In *Jackson*, this Court recognized that the option to self-insure "'is a privilege, and it is unimaginable [that] the legislature intended those to whom [West Virginia] grants this privilege would then be able to use it as a shield against liability to the public under circumstances where liability insurance would be required to pay.'" *Id.* at 594, 457 S.E.2d at 531. This Court made clear in *Jackson* that self-insurers are no different than third-party insurers with respect to the insurance coverage they provide. Pivotal to our ruling in *Jackson* was acknowledgment of the following tenet: "'[T]he fact that the legislature permits companies to formulate the most efficient insurance coverage should not be misconstrued as a device to avoid liability by the self-retention of risk.'" *Id.* at 592, 457 S.E.2d at 529 (quoting

> *Hillegass v. Landwehr*, 176 Wis.2d 76, 499 N.W.2d 652, 655-56 (1993)).

Korzun v. Chang-Keun Yi, 207 W. Va. 377, 379, 532 S.E.2d 646, 648 (2000) (footnote omitted). I should also note that I do not entirely agree with the majority's statement in footnote 2 that *Korsun* "applies only for procedural purposes."

Many large companies are self-insured up to a certain amount, and then carry insurance for sums beyond that amount. I am concerned that a person injured on the premises of a self-insured company might receive dramatically different treatment than a person injured on the premises of an insured company, or that a person with a claim just over the self-insured limit might receive different treatment than one whose claim fell just under that limit.

Presume, for example that large, self- insured "Company X" is self-insured up to $250,000. Any claim above that limit is covered by the insurer "Mutual of Y." Presume that a patron of Company X is injured by falling merchandise on the company's premises and files a claim for less than the $250,000 self-insured limits. In that case, Company X would investigate the claim, place a value on the claim, and negotiate with an injured party. Presume that another patron is injured in a similar accident, but has more severe injuries and has a claim greater than the $250,000 limits. In this second case, the patron's claim (or at least that portion over the limit) would be handled by "Mutual of Y." Under this scenario, presumably appellee Ford would argue that the second patron would have all the protection of the UTPA,

while the first would have none of those protections.[1] While we were not faced with such a case today, such an outcome strikes me as both illogical and unfair.

Finally, I am not convinced by the arguments of counsel to the effect that a decision to apply the UTPA to a large self-insured company would pose any threat to so-called "mom and pop" businesses. In most cases, "mom and pop" either have bought insurance from an insurance company, or have so few assets that a lawsuit against them is unlikely because of the difficulty of a recovery. Parading "mom and pop" before the Court when this case really concerns some of the country's largest corporations is not helpful to our analysis.

Having expressed these limited concerns, I concur with the majority's decision in this case.

[1]One could imagine a similar scenario, except that the second patron is injured in the store next-door, which happens to not be self-insured. The possibility of a disparate outcome for people with near identical injures remains the same.