IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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SUPREME COURT OF APPEALS
OF WEST VIRIGINIA

RAINES IMPORTS, INC., d/b/a LESTER RAINES HONDA, a West Virginia Corporation,

Plaintiff-Appellant,

v.

AMERICAN HONDA MOTOR COMPANY, INC., a California Corporation,

Defendant-Appellee.

APPEAL NO. 33803

CIVIL ACTION NO. 06-C-1422
The Honorable Charles E. King

BRIEF OF APPELLEE AMERICAN HONDA MOTOR CO. INC.

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October 22, 2008

TABLE OF CONTENTS

Page

Table of Authorities ii

I. THE KIND OF PROCEEDING AND NATURE OF THE RULING BELOW..1

II. COUNTER-STATEMENT OF FACTS AND BACKGROUND 1

III. RESPONSES TO ASSIGNMENTS OF ERROR 6

A. The Circuit Court Correctly Granted Summary Judgment on Standing Grounds Without Granting Discovery Because No Amount of Discovery Can Change a Distance of 16.3 Miles to 15 Miles or Less and There Were No Other Relevant Facts to Discover 6

B. America Honda Did Not Violate West Virginia Code § 17A-6A-12(3) As It Did Not "Establish" the New Dealership While the Action Was Pending 7

C. The Circuit Court Correctly Applied the 15-Mile RMA 7

IV. DISCUSSION OF LAW AND ARGUMENT 7

A. The Circuit Court Correctly Granted Summary Judgment on Standing Grounds Without Granting Discovery Because No Amount of Discovery Can Change a Distance of 16.3 Miles to 15 Miles or 7

B. American Honda Did Not Violate West Virginia Code § 17A-6A-12(3) As It Did Not "Establish" The New Dealership While the Action Was Pending 11

C. The Circuit Court Correctly Applied the 15-Mile RMA 12

1. Rules of Statutory Construction 13
2. The "Grandfather" Clause 15

V. CONCLUSION 16

Table of Authorities

Cases

Findley v. State Farm Mut. Auto. Ins. Co.,
213 W. Va. 80, 576 S.E. 2d 807 (2002) 9

Gallant v. County Comm'n,
212 W. Va. 612, 575 S.E. 2d 222 (2002) 14, 15

Harbaugh v. Coffinbarger,
209 W. Va. 57, 543 S.E. 2d 338 (2000) 9, 10

Moses Automotive, Inc. v. American Honda Motors Co., Inc.,
2007 WL 5595972 (S.D.W.Va. Aug. 2, 2007) 3, 5, 6, 8, 11, 13, 16

Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.,
196 W. Va. 692, 474 S.E. 2d 872 (1996) 9

Public Citizen, Inc. v. First Nat'l Bank,
198 W. Va. 329, 480 S.E. 2d 538 (1996) 14

Truman v. Farmers & Merchants Bank,
180 W. Va. 133, 375 S.E. 2d 765 (1988) 8

Statutes

W. Va. Code § 17A-6A-12 ..... passim

W. Va. Code § 17A-6A-3(14) 6, 16

W. Va. Code § 29-1-8 14

Rules

W. Va. R. Civ. P. 12(b) 7

Appellee American Honda Motor Co., Inc. ("American Honda"), respectfully submits this brief in response to the Brief ("Br.") of Appellant Raines Imports, Inc. d/b/a Lester Raines Honda ("Raines").

I. THE KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

Raines brought this action under W. Va. Code § 17A-6A-12(3), which authorizes the Circuit Court to grant declaratory relief to a new motor vehicle dealer when both of two elements are satisfied: (1) the manufacturer or distributor[1] is attempting to establish a new, same-brand dealership within the existing dealer's "relevant market area" (or "RMA"), defined (at the time this suit was filed) as a 15 air-mile radius around the existing dealer (the "standing" element); and (2) the manufacturer does not have "good cause" for establishing the new dealership in the RMA.

In this case, American Honda is *not* attempting to establish a new dealership within a 15 air-mile radius of Raines. It intends to establish a new dealership in Hurricane, West Virginia, on a site that is 16.3 miles away from Raines' site in South Charleston. Thus, the Circuit Court could not grant any relief to Raines under § 17A-6A-12(3). Recognizing this inescapable conclusion, the Circuit Court granted American Honda summary judgment on the ground that Raines had no standing.

II. COUNTER-STATEMENT OF FACTS AND BACKGROUND

Raines' Statement of Facts and Background is replete with mischaracterizations of the documentary evidence and is designed to give the false impression that (1) American Honda originally decided to locate a new dealership in South Charleston itself, rather than the South Charleston "area"; and (2) American Honda later "changed its mind" and "moved" the

[1] American Honda is the U.S. distributor of Honda vehicles and is affiliated with their manufacturer. For brevity's sake, American Honda will hereinafter use the single word "manufacturer."

dealership to a location 16.3 miles away from Raines. (Of course, even if those were the facts, a court still could not grant relief under § 17A-6A-12(3) because American Honda would no longer have been attempting to establish a new dealership within the 15 air-mile radius, but rather 16.3 miles away.) Raines paints this distorted picture by omitting facts and key language from the documents cited by it.

Raines' distortions begin with the letter dated May 24, 2006, from American Honda, which Raines attempts to characterize as a "notice" under § 17A-6A-12(2) that Honda intended to establish a new dealership within 15 air-miles of Raines. That letter, however, stated in pertinent part:

> *As a courtesy*, American Honda hereby advises you that another Honda franchise will be located in the "South Charleston" *area*.
>
> Currently, *no exact location* or specific timeline *has been established*, but it is anticipated that the new dealership could be operational by December 2007.

See Raines Br., Ex. B. (emphasis added). The letter does not purport to be a "notice" under § 17A-6A-12(2), and it makes no reference to the statute, the "relevant market area," or the right to file a declaratory judgment action within 60 days. To the contrary, the letter opens by stating that it is being provided "[a]s a courtesy" to Raines, not as a matter of statutory requirement. Most importantly, the letter clearly states that "no exact location" has yet been established. Without a location, of course, it was impossible to say whether any new dealership would be inside or outside of the RMA.

Raines emphasizes the words "South Charleston" to make it appear that the May 24 letter stated that the new dealership would be "in" South Charleston itself, but Raines ignores the word "area." As Raines knows, American Honda sent *the same* exact letter to Moses Honda, which is located in Barboursville, West Virginia, **over 30 miles** away from South Charleston, on the same

date. See Moses Automotive, Inc. dba Moses Honda v. American Honda Motor Co., Inc. 2007 WL 5595972 at *1 (S.D. W.Va. Aug. 2, 2007). (Raines' counsel in this case also represented Moses Honda in challenging the proposed Hurricane dealership in the Moses Honda case.) Obviously, the letter could not have been a statutory notice to Moses Honda concerning a new dealership "in" South Charleston since it would have been far outside of Moses' RMA. Rather, the letter was exactly what it said it was - - a "courtesy" to two area dealers, letting them know that American Honda had plans for a new dealership, but did not yet have an "exact location."

By letter dated July 19, 2006, Raines objected to American Honda's letter of May 24. See Raines Br., Ex. C. Raines' letter advised American Honda that Raines intended to file a declaratory judgment action pursuant to W. Va. Code § 17A-6A-12(3) "absent a representation by you that you will not establish another Honda franchise in the 'South Charleston' area." Id. Before American Honda had time to make the requested representation - - indeed, before American Honda even received the July 19 letter - - Raines filed its Complaint on July 20, 2006.

On July 27, 2006, before American Honda received process in this lawsuit or was even aware of its existence, American Honda sent a letter in reply to Raines' letter. See Raines Br., Ex. D. In its July 27 letter, American Honda (1) represented that the May 24 letter was *not* a "notice" pursuant to § 17A-6A-12(2); (2) reiterated that "American Honda has not decided on any specific location for a new dealership in the South Charleston area"; (3) pointed out that "[a]ccordingly, at this time it is impossible to determine whether any dealership established in the future might be within your relevant market area"; (4) represented that "American Honda does not anticipate that the prospective new dealership . . . will be within your relevant market area"; and (5) represented that "[i]f, however, American Honda decides to establish a new

dealership within your relevant market area, you will receive notice pursuant to § 17A-6A-12(2)." See Raines Br., Ex. D.

Despite the representations in American Honda's response to Raines' letter, Raines refused American Honda's request that it dismiss, or at least stay, this lawsuit until American Honda decided on a location for the new dealership. Raines thereby subjected American Honda to substantial, unnecessary trouble and expense to dispose of this lawsuit.

In September 2006, Honda filed a motion to dismiss and/or for summary judgment on the grounds that, since no location for the new dealership had yet been chosen, Raines had no standing, and hence, there was no case or controversy ripe for adjudication. After that motion had been pending for several months, American Honda decided on the location for the new dealership. As American Honda anticipated in its letter dated July 27, that location was *not* within Raines' RMA.

By letter dated January 26, 2007, American Honda's counsel (1) advised Raines' counsel of the exact location of the site in Hurricane where the proposed new dealership would be located, and (2) provided a copy of a survey performed by a professional surveyor licensed by the State of West Virginia (the "Survey") showing the specific parcel of land on which the new dealership would be located (the "Hurricane Site") and certifying that the distance between Raines' dealership and the Hurricane Site was 16.3 miles. See Exhibit 1, attached. (Letter, John J. Sullivan to David Barnette, dated January 26, 2007, and Survey).

In light of its decision to establish the new dealership at a site that was clearly *outside* of Raines' RMA, American Honda again asked Raines to dismiss its lawsuit. It also advised Raines that, if the suit were not withdrawn, it would amend and supplement its pending motion and ask the Circuit Court to grant summary judgment on the ground that there was no genuine issue of

material fact that the Hurricane Site was not within Raines' RMA. See Exhibit 1, attached. At Raines' counsel's request, American Honda's counsel also hand-delivered an enlarged copy of the Survey to Raines' counsel on January 31, 2007. See Exhibit 2 (letter, Mychal S. Schulz to David Barnette dated January 31, 2007).

Despite American Honda's stated intent not to establish the new dealership within Raines' RMA, Raines still refused to dismiss this lawsuit. Instead, in February and early March 2007, Raines and its counsel went to the West Virginia Legislature and lobbied for a bill, SB 601 that would amend the statute to enlarge the RMA from 15 to 20 miles. In so doing, Raines' counsel in this case, in response to questions from legislators concerned that SB 601 was designed to affect *this very lawsuit*, clearly and unambiguously stated that the change in the RMA proposed in SB 601 *would not* affect this lawsuit. As summarized by the Court in Moses Honda after its review of the statements made by Raines' counsel before the House Judiciary Committee on March 5, 2007, a review made by the court in a case where the dealership, represented by the same counsel as Raines, made the *same* arguments as those presented here:

> Mr. Barnett, the attorney representing Mr. Raines in his litigation, testified at the Judiciary Committee Hearings regarding the proposed changes and how the changes would affect the pending lawsuit. The committee members asked specifically about the effect of the legislation on the litigation surrounding the proposed Hurricane dealership. Mr. Barnett stated that the new language would not affect the litigation.

Moses Honda, 2007 WL 5595972, at *3 (citations omitted).

On March 5, 2007, American Honda amended and supplemented its pending motion to dismiss and/or for summary judgment, just as it had told Raines' counsel it would do in its letter dated January 26, 2007. See Exhibit 1. American Honda withdrew its "ripeness" argument and asked the Circuit Court to grant summary judgment based on the undisputed and indisputable fact that the Hurricane Site is more than 15 air-miles away from Raines' dealership.

On March 10, 2007, the Legislature passed SB 601, enlarging the statutory RMA to 20 miles. The Legislature included, however, a grandfather clause which provides that the 15-mile RMA would continue to apply to any proposed new dealership where the manufacturer and the proposed new dealer "have executed on or before the effective date of this statute a written agreement, including a letter of intent, performance agreement or a commitment letter, concerning the establishment of the proposed new motor vehicle dealership." W. Va. Code § 17A-6A-3(14).

On March 21, 2007, the Circuit Court heard oral argument on American Honda's motion for summary judgment. On March 26, 2007, the Circuit Court granted the motion. See Raines Br., Ex. A. On April 4, 2007, Governor Manchin signed SB 601.

On May 3, 2007, Moses Honda, represented by Raines' counsel, filed a complaint in which it alleged, among other things, that the new 20-mile RMA applied to the proposed Hurricane dealership. Moses Honda, 2007 WL 5595972, at *3. On August 2, 2007, Judge Chambers in the Southern District of West Virginia granted American Honda's pre-answer summary judgment motion. Id. at *8. Judge Chambers found, among other things, that the amendment changing the RMA from 15 to 20 miles did *not* apply to the proposed Hurricane dealership because a letter of intent for the new dealership was entered into by American Honda and the proposed new dealers, Jackie and Rebecca Mitchell, on March 2, 2007, *prior* to the effective date of SB 601. Id. at *6. The Moses Honda ruling was not appealed.

III. RESPONSES TO ASSIGNMENTS OF ERROR

A. The Circuit Court Correctly Granted Summary Judgment on Standing Grounds Without Granting Discovery Because No Amount of Discovery Can Change a Distance of 16.3 Miles to 15 Miles or Less and There Were No Other Relevant Facts to Discover

B. America Honda Did Not Violate West Virginia Code § 17A-6A-12(3) As It Did Not "Establish" the New Dealership While the Action Was Pending

C. The Circuit Court Correctly Applied the 15-Mile RMA

IV. DISCUSSION OF LAW AND ARGUMENT

A. The Circuit Court Correctly Granted Summary Judgment on Standing Grounds Without Granting Discovery Because No Amount of Discovery Can Change a Distance of 16.3 Miles to 15 Miles or Less and There Were No Other Relevant Facts to Discover

Rule 12(b) of the West Virginia Rules of Civil Procedure expressly provides that a motion to dismiss under Rule 12(b)(6) may be converted, under certain circumstances, into a motion for summary judgment under Rule 56.[2] Since a Rule 12(b)(6) motion is, by definition, made prior to the filing of an answer or the taking of any discovery, Rule 12(b) recognizes that there are certain cases where summary judgment is appropriate without the need for any discovery. The Circuit Court correctly ruled that this is such a case. Accord, Moses Honda, 2007 WL 5595972, at *5-6 (granting pre-answer summary judgment, without discovery, under similar provisions of Federal Rule 12(b)(6), on ground that Hurricane Site was 15.9 miles away from Moses Honda).

American Honda sought summary judgment on the grounds that (1) the Hurricane Site was indisputably outside of the 15 air-mile radius RMA of Raines, and (2) therefore, Raines could not satisfy the standing element. In support of its motion, American Honda submitted the Survey performed by a licensed, professional surveyor, showing that the Hurricane Site was 16.3 air-miles away from Raines' site. American Honda gave this Survey to Raines' counsel on January 26, 2007, and advised him that it would be American Honda's basis for summary

[2] The last sentence of Rule 12(b) provides: "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." W. Va. R. Civ. P. 12(b).

judgment. Thus, Raines had almost *two months* before the oral argument of the summary judgment motion to obtain its own survey to measure the distance, if there had actually been any basis to question the accuracy of the Survey.

In opposing American Honda's motion, Raines was not automatically *entitled* to discovery simply because it *asked* for discovery. The very case on which Raines places principal reliance holds that the court must grant a Rule 56(f) request only when "'facts **relevant to** a motion for summary judgment need to be developed by further discovery.'" Truman v. Farmers & Merchants Bank, 180 W. Va. 133, 136, 375 S.E. 2d 765, 768 (1988) (emphasis added). Further, this Court has held that a party seeking discovery under Rule 56(f) must satisfy the following four-part test:

> (1) articulate some plausible basis for the party's belief that specified "discoverable" material facts likely exist which have not yet become accessible to the party; (2) demonstrate some realistic prospect that the material facts can be obtained within a reasonable additional time period; (3) demonstrate that the material facts will, if obtained, suffice to engender an issue both genuine and material; and (4) demonstrate good cause for failure to have conducted the discovery earlier.

Harbaugh v. Coffinbarger, 209 W. Va. 57, 63, 543 S.E. 2d 338, 344 (2000) (quoting Powderidge Unit Owners Ass'n v. Highland Properties, Ltd., 196 W. Va. 692, 695, 474 S.E. 2d 872, 875 (1996)).

Raines has not even addressed, much less attempted to satisfy, this four-part test. Raines has not articulated any "plausible basis" that there are "discoverable" facts concerning the distance measurement between its dealership and the Hurricane Site that were not "accessible" to Raines. Nor has it demonstrated any "realistic prospect" that it can obtain any "material facts" showing that the Hurricane Site is within a 15 air-mile radius of Raines, rather than 16.3 air-miles away as shown by the Survey.

The distance between two points is a simple, readily ascertainable, objective fact that is equally accessible to both sides. American Honda's counsel provided a copy of the Survey to Raines' counsel on January 26, 2007, and an enlarged copy on January 31, 2007. The Survey was the basis of American Honda's amended motion. Thus, Raines simply misrepresents the record when it claims that (1) American Honda's position on the distance was unsupported by evidence, and (2) Raines "was not given the opportunity to retain its own surveyor." Raines Br. at 8. Raines had ample time to retain its own surveyor if it *really* believed there was any issue as to the accuracy of the Survey. Instead, Raines and its counsel demonstrated their belief that the Survey was completely accurate: they devoted their time, money, and efforts in February and early March 2007 to lobbying the Legislature to increase the statutory RMA from 15 to 20 miles rather than obtaining another survey.

Standing is an issue on which Raines had the burden of proof. Findley v. State Farm Mut. Auto Ins. Co., 213 W. Va. 80, 95, 576 S.E. 2d 807, 822 (2002). Therefore, once American Honda presented the Survey in support of its motion, the burden shifted to Raines to present affirmative evidence that the Hurricane Site was within a 15 air-mile radius of Raines' dealership to avoid summary judgment. As this Court has explained:

> As to material facts on which the nonmovant will bear the burden at trial, the nonmovant must come forward with evidence which will be sufficient to enable it to survive a motion for directed verdict at trial. If the nonmoving party fails to meet this burden, the motion for summary judgment *must* be granted.

Harbaugh, 209 W. Va. at 62, 543 S.E. 2d at 343 (emphasis in original) (internal quotations and citations omitted).

Raines' current complaint that it needed discovery to determine the distance between the two points – rather than simply doing its own measurement – is not only unreasonable but is

unsupported by Raines' Rule 56(f) request dated March 12, 2007. The bulk of the discovery sought by Raines in that Rule 56(f) request related to the "good cause" issue. See Raines Br., Ex. E, ¶ 6. Similarly, as Raines concedes, the discovery requests that Raines served on American Honda during the litigation were "targeted specifically to" the good cause issue. Raines Br. at 3-4. The issue of good cause, however, was not relevant to the grounds for the summary judgment motion — if Raines has no standing to sue under the statute, American Honda need not show "good cause." Therefore, the Rule 56(f) request for discovery on that issue was properly denied.

Raines did suggest, in passing, that it needed discovery as to the "[t]he exact location of the proposed new dealership (as established by a surveyor of my choice)." See Raines Br., Ex. E, ¶ 6. This suggestion was and is implausible, however, because American Honda provided the Survey showing the exact location on January 26, 2007, and, as noted above, Raines had ample time to hire a surveyor to measure the distance. It simply chose not to do so.

Raines also suggests that it was entitled to discovery as to "whether American Honda intended its May 24, 2006, letter to constitute statutory notice." Raines Br. at 8. No such contention was made by Raines, however, in its Rule 56(f) request. See Raines Br., Ex. E. Moreover, the May 24 letter was a written document that spoke for itself. It was the function of the circuit court to determine, as a matter of law, whether or not that document on its face constituted a notice under § 17A-6A-12(2). As shown above, the letter did not purport to be such a notice and did not contain the information that would be required in such a notice. Further, American Honda advised Raines that the letter was not such a notice promptly after receiving Raines' letter indicating that Raines construed it to be such a notice. Moreover, American Honda sent the same May 24 letter to Moses Honda, and as noted above, that letter

could not have been a statutory notice to Moses Honda. See Moses Honda, 2007 WL 5595972, at *1; pp. 2-3 supra.

In any event, Raines does not explain how discovery concerning the May 24, 2006, letter creates a real, justiciable issue under § 17A-6A-12(3). The purpose of a § 17A-6A-12(2) notice is to give the dealer an opportunity to protest the establishment of a new dealership *within* the dealer's 15-mile RMA. The evidence in this case indisputably establishes that the site on which American Honda is attempting to establish the new dealership is 16.3 miles away.

In short, there was no need for discovery to enable Raines to meet its burden of proof that the Hurricane Site was within a 15 air-mile radius of Raines' dealership. Raines could easily have obtained such proof, if any existed, by hiring a surveyor Obviously, however, it is impossible to "discover" proof that 16.3 miles equals 15 miles or less. The Circuit Court did not err, therefore, in granting summary judgment without allowing the discovery sought by Raines.

B. American Honda Did Not Violate West Virginia Code § 17A-6A-12(3) As It Did Not "Establish" The New Dealership While the Action Was Pending

Raines contends that American Honda (1) violated a statutory provision that the manufacturer "shall not **establish** or relocate the proposed new motor vehicle dealer" after an action is filed, by (2) "**continu[ing] to take steps to attempt** to establish" the dealership. Compare W. Va. Code § 17A-6A-12(3) (emphasis added) with Raines Br. at 9 (emphasis added). There is an obvious – and fatal – variance between what the statute forbids and what Raines alleges American Honda did.

The statute provides that a manufacturer may not "establish" the new dealership. American Honda did not establish the new dealership. The statute does not forbid manufacturers – or prospective new dealers, for that matter – from taking steps to protect their interests and *prepare* to establish a new dealership (such as by acquiring available property) in the hope that

the Circuit Court will ultimately reject the existing dealer's objection. Of course, they do so at their own risk that the objection may ultimately be upheld, and so their preparation efforts may come to naught.

Raines' reading of § 17A-6A-12(3) is not only inconsistent with its plain language, but it would give existing dealers unwarranted power to protect themselves from legitimate competition by filing meritless lawsuits to frustrate and delay any such competition. This case provides an excellent example of this danger. Raines filed this lawsuit even though American Honda had not served any notice stating that it intended to place a new dealer in the RMA. Raines continued this lawsuit even though American Honda promptly advised Raines, after receiving Raines' letter dated July 19, 2006, that its letter of May 24, 2006 was not a statutory notice, and if American Honda ever did decide to locate a new dealer in Raines' RMA, it would serve Raines with a statutory notice. Now, Raines takes the position that its mere filing of this lawsuit prevented American Honda from even "taking steps" to establish the new Hurricane dealership at a site that is **clearly outside of the RMA**. Any such interpretation of the statute would be absurd. See Moses Honda, 2007 WL 5595972, at *8 (rejecting the claim that American Honda had violated §17A-6A-12(3) because "[t]here was no required statutory notice that would precipitate the action for an injunction" and "the statute would only apply if the new dealership was located within Moses' or Raines' relevant market," which it was not).

C. The Circuit Court Correctly Applied the 15-Mile RMA

Raines contends that the Circuit Court erroneously applied the 15-mile RMA rather than the amended 20-mile RMA passed by the Legislature on March 10, 2007. This contention is meritless for two independent, alternative reasons. First, under established rules of statutory construction, the amended statute should not be applied to this previously-pending action. Second, the Hurricane Site falls with SB 601's "grandfather clause," which the Legislature

included in the statute with this very case in mind. See Moses Honda, 2007 WL 5595972, at *6 (holding that the 15-mile RMA applies to the Hurricane Site).

1. Rules of Statutory Construction

The amended statute was not intended to be retroactively applied to this case, and under established rules of statutory construction, it cannot be so applied. "Under West Virginia law, a statute that diminishes substantive rights or augments any substantive liabilities should not be applied retroactively to events completed before the effective date of the statute . . . unless the statute provides explicitly for retroactive application." Public Citizen, Inc. v. First Nat'l Bank, 198 W. Va. 329, 334, 480 S.E. 2d 538, 543 (1996); Gallant v. County Comm'n, 212 W. Va. 612, 618, 575 S.E. 2d 222, 228 (2002). "To be specific, this means that, unless expressly stated otherwise by the statute, such a statute **will not apply to pending cases** or cases filed subsequently based upon facts completed before the statute's effective date." Public Citizen, 198 W. Va. at 334-35, 480 S.E. 2d at 543-44 (emphasis added).

Here, SB 601 diminishes manufacturers' substantive rights to establish new dealerships between 15 and 20 miles away from existing dealerships, and the statute does not explicitly provide for retroactive application. Therefore, under Public Citizen, SB 601 does not apply to this case if *either* (i) it was a "pending case" *or* (ii) it was "based on facts completed before the statute's effective date." SB 601 is inapplicable to this case on *both* of these grounds.

First, this case was indisputably pending long before the effective date of SB 601, as it was commenced on July 20, 2006. On that ground alone, SB 601 is inapplicable.

Second, this case involves "facts completed before the statute's effective date." The proper application of this rule is illustrated in Gallant, supra. There, the Jefferson County Commission decided in November 2000 to demolish the Jefferson County Jail, which was on the

National Register of Historic Places. Gallant sued in December 2000 to enjoin the demolition on the ground that the Commission had failed to comply with the historic review process required by W. Va. Code § 29-1-8. On January 17, 2001, the lower court issued a temporary injunction against demolition. On April 14, 2001, while the case was still pending, the Legislature amended the statute so that it no longer applied to the type of decision made by the Commission (based on the source of funds being used). The lower court thereafter applied the new law and dissolved the injunction.

This Court reversed in pertinent part, holding that the new statute could not be retroactively applied to the case. Even though the demolition had not yet taken place, the determinative fact was that "[t]he decision to demolish the jail was made prior to the amendment to the statute." Gallant, 212 W. Va. at 618, 575 S.E. 2d at 228.

Here, Raines based its suit on the letter from American Honda dated May 24, 2006. American Honda decided by January 2007 to establish the new dealership at the Hurricane Site, 16.3 miles away from Raines' dealership. Thus, the operative events occurred *prior* to the amendment of the statute. As in Gallant, the new statute may not be applied retroactively to these events.

It should be also noted that Governor Manchin signed SB 601 on April 4, 2007. Thus, even though the "effective date" of SB 601 is March 10, 2007, as of the date this case was argued (March 21, 2007) and decided by the Circuit Court (March 26, 2007), SB 601 was not yet a law. Raines cites no authority for the proposition that, where a court correctly applies the law as it existed as of the date of its decision, it may nevertheless be reversed and directed to give the losing party a "do-over" under a law thereafter signed by the Governor.

2. The "Grandfather" Clause

In addition to general rules of statutory construction, SB 601's 20-mile RMA does not apply because this case fits squarely within the statute's "grandfather" clause -- which the Legislature included in the statute specifically so the enlarged RMA would not affect *this very case*. See Moses Honda, 2007 WL 5595972, at *3.

During the Judiciary Committee hearings on SB 601, several legislators expressed concern to Raines' counsel that, by advocating the enlargement of the statutory RMA, he was attempting to affect the outcome in this lawsuit. Raines' counsel responded by stating that the amendment would not affect this lawsuit. Id. Raines, of course, now takes the exact opposite position.

In the final bill, the Legislature incorporated a proviso to make it clear that the amended RMA would not apply to this case or to any other case in which the manufacturer had, before the effective date of the amendment, entered into an agreement with a proposed new dealer to establish a new dealership outside of the 15 air-mile RMA. Thus, the amended statute reads as follows:

> "Relevant market area" means the area located within a twenty air-mile radius around an existing same line-make new motor vehicle dealership: **Provided,** That a fifteen mile relevant market area as it existed prior to the effective date of this statute shall apply to any proposed new motor vehicle dealership as to which a manufacturer or distributor and the proposed new motor vehicle dealer have executed on or before the effective date of this statute a written agreement, including a letter of intent, performance agreement or commitment letter, concerning the establishment of the proposed new motor vehicle dealership.

W. Va. Code § 17A-6A-3(14) (as amended March 10, 2007) (emphasis added).

In Moses Honda, the court found that American Honda and the proposed new Hurricane dealers, Jackie and Rebecca Mitchell, executed a letter of intent concerning the establishment of

the new dealership on March 2, 2007. Moses Honda, 2007 WL 5595972, at *6. Accordingly, the court ruled that the proposed Hurricane dealership fits within the grandfather clause and that the 15-mile radius, not the 20-mile radius, applies to the proposed Hurricane dealership. Id. This conclusion applies here with equal force. The new statute, therefore, does not apply to this case.

V. CONCLUSION

For all of the foregoing reasons, American Honda respectfully requests that the Court affirm the judgment of the Circuit Court.

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EXHIBIT 1

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Re: Raines v. American Honda Motor Company, Inc.
Civil Action No. 06-C-1422 (Circuit Court of Kanawha County, West Virginia)

Dear David:

On behalf of American Honda Motor Co., Inc. ("AHM"), I am writing with respect to the above-referenced lawsuit brought by your client, Lester Raines Honda ("Raines").

Even before AHM became aware (on August 1, 2006) that the lawsuit had been filed, AHM wrote to your client (on July 27, 2006) confirming (i) that AHM's letter of May 24, 2006 was not a statutory notice under W.Va. Code § 17A-6A-12(2), and (ii) AHM's statement in the May 24 letter that it had not yet decided on a specific location for the new dealership.

In the first conversation between you and Mychal Schulz and me about the lawsuit, I asked you to dismiss it, or at least stay it, because it was premature and therefore was a waste of time, money, and resources for your client and ours. I told you that AHM expected to choose a dealer and a location in late 2006 or early 2007, and that we could determine at that time whether AHM would have any need to send a statutory notice and thus whether Raines would have any standing to sue under § 17A-6A-12(3). Raines declined to dismiss or stay.

As anticipated, AHM has now chosen a dealer candidate and a location for the new dealership – i.e., on I-64 in Hurricane, West Virginia next to Hurricane Chevrolet (the "Site"). I am enclosing a survey from Ronald D. Fink, a professional surveyor licensed by the State of West Virginia, which (i) shows the precise parcel of land on which the dealership will be located and (ii) certifies that the distance between Lester Raines Honda and the Site is 16.3 miles. The Site is thus not within Raines's 15-mile radius "relevant market area" ("RMA") under W.Va. Code § 17A-6A-3(14). Therefore, Raines has no standing to seek a declaratory judgment under W.Va. Code § 17A-6A-12(3) with respect to the Site.

K&L|GATES

Accordingly, we are now asking you to save both your client and our client any additional needless expense by voluntarily dismissing the lawsuit. Please let Mychal or me know as soon as possible whether Raines will agree to do so.

If Raines does not voluntarily dismiss the action, AHM plans to supplement its pending motion for dismissal and/or summary judgment and by asking the Court for summary judgment on the ground that there is no genuine issue of material fact as to whether the Site is within Raines's RMA and, therefore, as to Raines's lack of statutory standing. In that event, AHM also reserves its right to seek sanctions under Rule 11 for Raines's institution and/or continuation of an action that has no basis in law or fact.

Very truly yours,

John J. Sullivan

JJS/mrm
Enclosure

cc: Richard Otera, Esq. (by telefax)
Mychal Sommer Schulz, Esq. (by telefax)

NOTE

IT IS NOT THE PURPOSE OF THIS SURVEY TO ACCURATE SURVEY OF SITE, ALLOCATE AN ORTHOPHOTOMAP OF SITE, THIS SURVEY IS SUBJECT TO ALL RIGHT OF WAY, EASEMENTS AS ENCUMBRANCES OF RECORD.

ALL TRUE BEARINGS ARE BASED ON MAP DATA, ALL STATIONING, DISTANCE, AND ELEVATIONS PROVIDED LAW OF APPROXIMATE LOCATION ONLY, AND MAY NOT BE BASED TO CONTROL ROUTE.

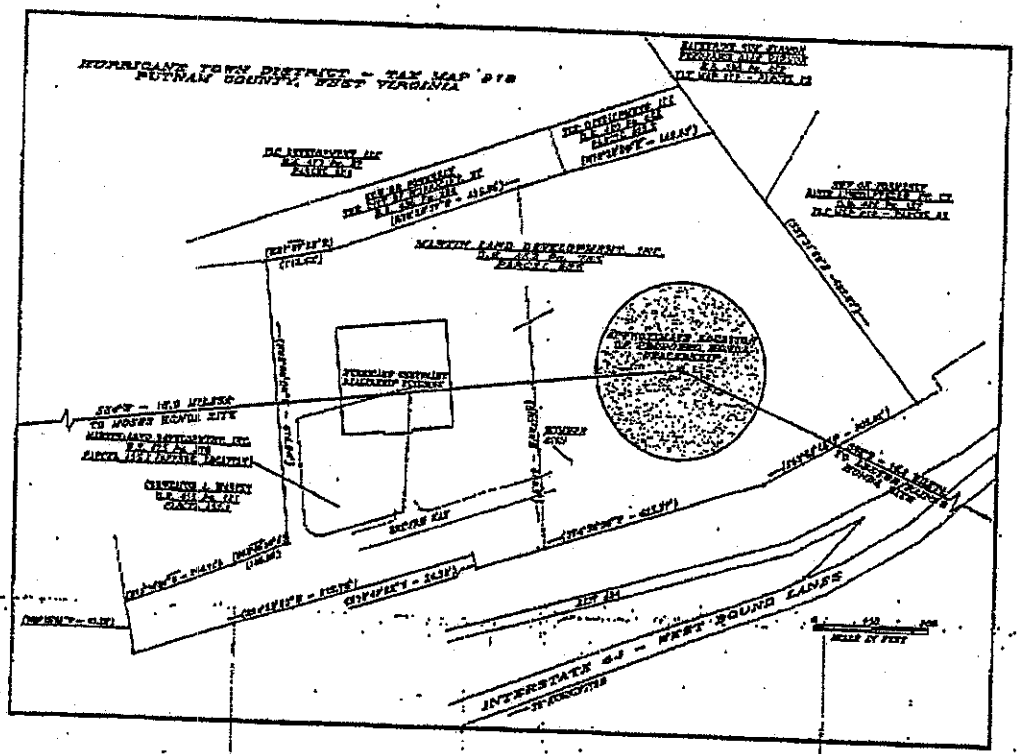
THIS SURVEY WAS COMPLETED WITHOUT BENEFIT OF A TITLE SEARCH AND IS SUBJECT TO THE RAIL. CONDITIONS TO REVISE ANY RIGHT OF WAY, EASEMENTS OR ENCUMBRANCES AS FOUND, AT THE TIME THE SITE IS ACTUALLY PLATTED AND MAPPED, THE SURVEY UPON A PARCEL.

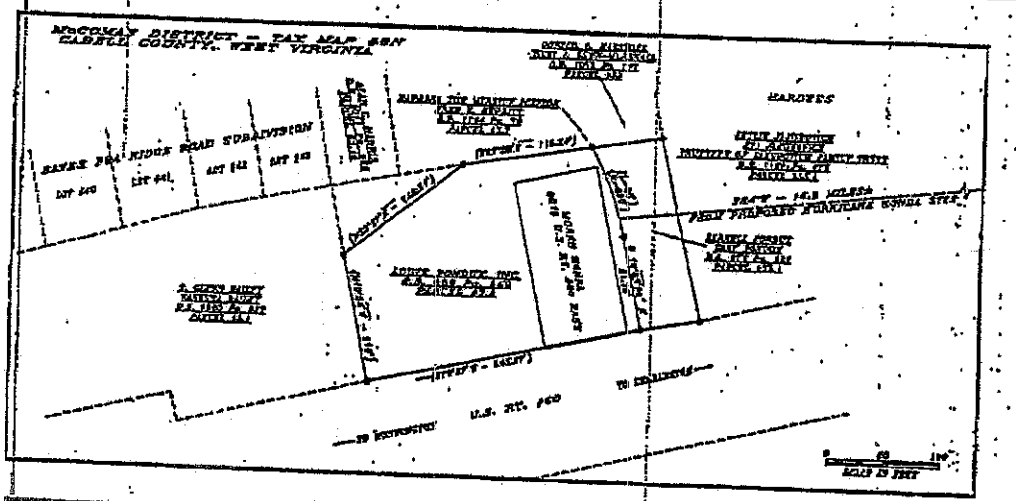
THIS SURVEY IS A COMPILATION OF THE BOUNDARY AND THE A PARCEL SURVEY OF EACH SITE ADDED, AS IT IS CONSIDERED TO BE A MINIMUM SURVEY OF SAID SITES.

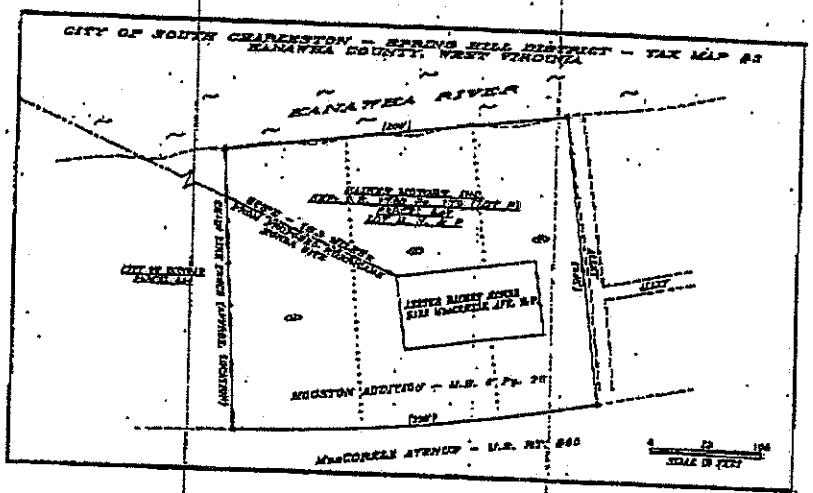
ALL PERTINENT BUILDING SETBACK LINES ARE SHOWN IN THE MINIMUM WIDTH.

IF THE DIRECTION PROMPTS PERMANENT PANEL THE ADDING COURSE THEN THE INTERNAL SITES ARE NOT INCLUDED.

IT IS NOT THE INTENT OF THIS SURVEY TO ESTABLISH ANY RIGHT OR CONTROL BASE BOUNDARY LOCATION OF PROPOSED BUILDING SITE TO CREEK WHICH ARE ESTABLISHED. NOT IN ACCORDANCE WITH THE ADVICE AND ADVICE ADVICE. THE PLANNER ENGINEER, THIS SURVEYOR ASSUMES NO RESPONSIBILITY FOR ANY GROSS PARTY DISCREPANCIES OF THE BASE DATA.







PLAT OF SURVEY

CENTER THE EXACTLY LOCATION OF THE PROPERTY SURVEYED WHEN PLACED IN THE WORK SHEET PREPARED AND THE CENTER BASED WORK COMPLETED, SURVEYED 12-07 & 01-07 BY DONALD L. FIRE R.L. 1797 PUBLIC RD. PATTERSON, WV 26766.

R.L. Fire R.S.

FIRE ENTERPRISES
LAND SURVEYING & MAPPING
1797 PUBLIC RD. PATTERSON, WV 26766
(304) 421-1605
BRIAN ST. JOSEPH L. FIRE

EXHIBIT 2

Dinsmore&Shohl LLP
ATTORNEYS

Mychal Sommer Schulz
304-357-0906
mychal.schulz@dinslaw.com

January 31, 2007

Via Facsimile 304.340.1380
David Allen Barnette, Esquire
JACKSON KELLY PLLC
1600 Laidley Tower
Post Office Box 553
Charleston, WV 25322

Re: *Raines Imports, Inc. d/b/a Lester Raines Honda, a West Virginia Corporation, vs. American Honda Motor Company, Inc., a California Corporation*
Civil Action No. 06-C-1422 - Kanawha County Circuit Court

Raines Imports, Inc., d/b/a Lester Raines Honda, a West Virginia Corporation, vs. American Honda Motor Company, Inc., a California Corporation
Civil Action No. 2:06-0650 - United States District Court for the Southern District of West Virginia

Dear David:

This letter will confirm that I provided to you this morning four 11x17 copies of the Plat of Survey performed by Joseph A. Fink. If the copies are unreadable or inlegible in any way, I ask that you let me know immediately so that I can get better copies to you.

Please call me if you have any questions

Sincerely,

Mychal Sommer Schulz

MSS/tll

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

RAINES IMPORTS, INC., d/b/a LESTER RAINES HONDA, a West Virginia Corporation,

Plaintiff-Appellant,

v.

AMERICAN HONDA MOTOR COMPANY, INC., a California Corporation,

Defendant-Appellee.

APPEAL NO. 33803

CIVIL ACTION NO. 06-C-1422
The Honorable Charles E. King

CERTIFICATE OF SERVICE

The undersigned counsel do hereby certify that I served a true and exact copy of the foregoing ***Brief of Appellee American Honda Motor Co., Inc.*** upon all counsel of record, by depositing the same in the United States mail, postage prepaid, and addressed as follows, this 22nd day of October, 2008:

David Allen Barnette (WVSB #242)
Laurie K. Miller (WVSB #8826)
Vivian H. Basdekis (WVSB #10587)
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1600 Laidley Tower
Post Office Box 553
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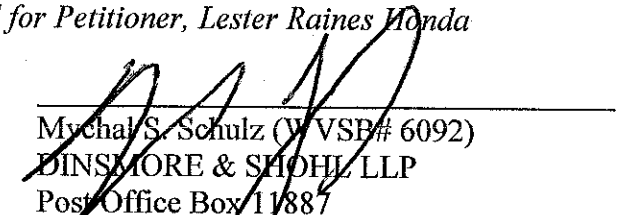
304.340.1000
Counsel for Petitioner, Lester Raines Honda



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