IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JOHN T. WHITLEY — APPELLANT

V. — CAUSE NO. 2008-CA-00066

CITY OF BRANDON, MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLEE

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

Hon. Dan H. Fairly	Chancery Court Judge for the Twentieth Chancery Court District
John T. Whitley	Appellant
City of Brandon, Mississippi and its Mayor and Board of Aldermen	Appellee
Harry J. Rosenthal	Attorney for the Appellant
Mark C. Baker Jarrod W. Taylor	Attorneys for the Appellee

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I. STATEMENT OF THE CASE

Contrary to the brief of the Appellant (hereinafter "Whitley"), this case is **not** about his right to a nonconforming use after annexation nor is it about his right to farm. This case is about Whitley's willful maintenance of a nuisance in the form of an unlicensed junkyard that presents a danger to the citizens of Appellee (hereinafter "Brandon"). Whitley seeks review of the Judgment of the Chancery Court of Rankin County, the Honorable Dan Fairly presiding, entered on the 14th day of December, 2007, and subsequent orders whereby Whitley was mandated to abate the nuisance. Further, Whitley attempts to convince the Court, contrary to statute and common law, that he was entitled as a matter of right to a supersedeas bond pending appeal and while in willful contempt of the Chancellor's orders.

II. STATEMENT OF THE FACTS

A. Matters outside the record

It must be addressed at the outset that Whitley failed to adequately compile the Record with respect to this appeal. Whitley's entire Assignment of Error No. 3 takes issue with multiple proceedings that took place after the Chancellor's Judgment of December 14, 2007. *See* Appellant's Brief at 7. A record was made of these proceedings and was available for Whitley to have included in the Record. It is respectfully submitted that this Assignment of Error is not properly before the Court.

B. Whitley's unlicensed junkyard constituted a nuisance

The conditions maintained on Whitley's property were unlawful. Whitley maintained an unlicensed junkyard of discarded automobiles, automobile parts, and other hazardous items on the property that comprised an unsafe condition and that was detrimental to the citizens of Brandon and their property. Whitley's property where the subject vehicles were stored is zoned by Brandon as R-1, "Low Density Residential District". 22:25-29 - 23:1-2, R.E. 113-14. Junkyards are not permitted uses in this zoning district. C.P. 21 & 28, R.E. 16 & 23.

Prior to the initiation of the present action, Brandon put Whitley on notice that his improper storage of the vehicles violated multiple ordinances by certified mail sent July 11, 2007.[1] C.P. 30-31, R.E. 25-26. After refusing to comply with the ordinances as referenced in

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[1] Brandon's July 11, 2007, letter clearly informed Whitley of the specific code sections violated by his improper storage of the vehicles; therefore, Whitley cannot realistically maintain the position that he was unaware of what Brandon's ordinances required of him in his void for vagueness argument.

Brandon's July 11th letter, on August 14, 2007, Brandon cited Whitley for violating the following ordinances: IPMC 302.8, adopted through Section 18-61 (C.P. 16, R.E. 11); Section 415 (C.P. 17, R.E. 12); and Section 1901.03A (C.P. 18, R.E. 13), and Whitley was convicted of violating these codes in the Brandon's Municipal Court. C.P. 38-40, R.E. 33-35.

On December 12, 2007, a trial was held before the Chancery Court of Rankin County, the Honorable Dan Fairly presiding, on Brandon's Complaint for Injunctive and Other Relief. At the conclusion of the trial, the Chancellor found that Brandon had met its burden of proof to obtain an injunction mandating that Whitley abate the nuisance. 160:18-23, R.E. 153. The Chancellor specifically found that the conditions on Whitley's property constituted a nuisance under Brandon's ordinances by virtue of *inter alia* Whitley's clear violation of Brandon's duly adopted ordinance Section 18-61, Section 302.8 of the International Property Maintenance Code, providing that no inoperative motor vehicles shall be parked, kept, or stored on any premises at any time in a major state of disrepair, or in the process of being stripped or dismantled and Section 415 which prohibits vehicles or trailers of any type which require license or state inspection stickers, but are without current license plates or do not have current state inspection stickers affixed to the vehicle or trailer to be parked in any residentially zoned area other than in completely enclosed buildings. 164:19-29 - 165:1-7, R.E. 156-157 and C.P. 16-17, R.E. 11-12.

On January 4, 2008, Whitley filed a Motion for New Trial or Reconsideration of the Judgment, Notice of Appeal, and Designation of Record. C.P. 105-110, R.E. 79-84. On January 10, 2008, the Chancellor entered an Order denying the said Motion for New Trial or

Reconsideration. C.P. 112, R.E. 85.

In anticipation that Whitley would not comply with the Chancellor's December 14th Judgment, Brandon filed a Motion for Contempt, Permission to Enter Property and Execute on Judgment and Related Relief on January 24, 2008. C.P. 116-119, R.E. 86-89.

On February 4, 2008, Whitley filed a motion to set a supersedeas bond. C.P. 120, R.E. 90. A hearing[2] was held on both of these motions on February 4, 2008, whereby the Chancellor found Whitley in contempt, but withheld action at that time and ordered Whitley to provide the Court and Brandon with a cost estimate of removing the subject vehicles by February 11, 2008 and continued the hearing until February 19, 2008. C.P. 122-123, R.E. 92-93. On February 13, 2008, Whitley filed his cost estimate of removing the vehicles with the court. C.P. 121, R.E. 91.

At the conclusion of the February 19th hearing,[3] the Court directed Brandon to pay the cost estimate of $1250.00 provided by Whitley's witness, James Tate of ACE Auto Sales for the removal of all non-compliant vehicles and ordered Whitley to pay the storage charges of $300.00 per month during the pendency of the appeal. C.P. 125, R.E. 95. The Chancellor also held that if Whitley did not prevail on his appeal he would be assessed as costs the $1250.00 Brandon was ordered to pay for the removal of the vehicles and that if Whitley were successful on appeal, Brandon would be assessed costs in addition to any other costs assessed to it, the sum of $300.00 per month for the storage costs paid by Whitley to ACE

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[2] A record was made of this hearing but Whitley did not include the same in the Record transmitted to this Court.

[3] A record was made of this hearing but Whitley did not include the same in the Record transmitted to this Court.

Auto Sales during the pendency of the appeal. *Id.* at ¶ 5. The Chancellor further held that the non-compliant vehicles and parts were to be removed by "Whitley, his agents, contractors and/or employees within ten (10) days from February 19, 2008". C.P. 126 at ¶ 8, R.E. 96.

On March 5, 2008, Brandon filed a Motion for Review and Related Relief proffering to the court that the non-compliant vehicles had not been removed as ordered by the Chancellor (C.P. 131 at ¶ 4, R.E. 97) and said motion was set for hearing at 8:30 a.m. on March 11, 2008.

At the March 11th hearing,[4] the Chancellor found that Whitley was in contempt for his failure to abide by the court's previous orders and gave him until 5:00 that day to fully comply with said orders or surrender himself to the Rankin County Sheriff. C.P. 137-38 at ¶ 14, R.E. 99-100. Rather than remove the non-compliant vehicles and related parts as ordered by the Court, Whitley surrendered himself to the Rankin County Sheriff on March 11, 2008.

On March 12, 2008, Brandon filed a Motion for Permission to Enter Property and Remove Vehicles and Related Relief with said motion set for hearing on the following day. C.P.139-145, R.E. 101-107. Because counsel for Whitley was unable to be located, the noticed hearing was not held on the motion. During the time of Whitley's incarceration he had the non-compliant vehicles and parts removed thereby mooting Brandon's March 12th motion.

On March 19, 2008, and Whitley was released from incarceration. C.P. 147, R.E. 108.

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[4] A record was made of this hearing but Whitley did not include the same in the Record transmitted to this Court.

III. STATEMENT OF THE ISSUES

THE CHANCELLOR DID NOT ERR IN GRANTING BRANDON AN INJUNCTION MANDATING THAT WHITLEY ABATE THE NUISANCE

THE CHANCELLOR DID NOT ERR IN DENYING WHITLEY SUPERSEDEAS BOND

IV. SUMMARY OF THE ARGUMENT

The ultimate issue *sub judice* is whether Whitley has the right to maintain a public nuisance on his property in the form of an unlicensed, hazardous, and vandal-attracting[5] junkyard after his property was duly annexed by Brandon.[6]

As discussed further herein, it is well established in numerous jurisdictions that no citizen enjoys a vested right in harming the public through the maintenance of a nuisance.

The Chancellor heard extensive testimony and reviewed numerous exhibits establishing that Whitley's use of his property constituted a nuisance and violations of

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[5] Whitley himself testified that the vehicles at issue had been vandalized numerous times.

[6] A "junkyard" is defined by Section 58-51 of Brandon's ordinances as "any place where three or more vehicles not in operating condition are located within ten feet of each other. C.P. 20, R.E. 15. Pursuant to Section 58-72 of Brandon's ordinances it is "unlawful for any person to operate a junkyard within 200 yards of U.S. Highway 80 or Mississippi Highway Nos. 18, 468, and 471 in the city". C.P. 21, R.E. 16. Moreover, any person desiring to operate a junkyard in Brandon must first make an application for and receive a permit to operate the same. C.P. 22-23, R.E. 17-18. As testified to by Mr. Robbie Powers, the subject property is located on Highway 471 (12:19-24, R.E. 109 and *see* Exhibits P-8, R.E. 164-68 and P-10, R.E. 170), is located in a residentially zoned district, the non-compliant vehicles and related parts were located within 200 yards of Highway 471 (*See* Exhibits P-8, R.E. 164-68 and P-10, R.E. 170: all exhibits used at the December 12, 2007 trial were designated for the Record as compiled by Whitley, but were not assigned numbers in the Clerk's Papers before transmittal to the Clerk of this Court) and had approximately 46 inoperable vehicles located within ten feet of one another. C.P. 63-104, R.E. 37-78.

Brandon's ordinances which created a situation of either irreparable harm or the potential for irreparable harm or injury. 164:18-23, R.E. 156.

The Chancellor heard multiple experts testify regarding the nuisance. As more fully stated herein, Mr. George Guest, P.E., gave opinions regarding Brandon's interest in regulating inoperable vehicles in order to protect the public health and welfare from pollutants that can result from various aspects of inoperable vehicles; Mr. David E. Wade, the Brandon's City Planner, gave expert opinions regarding Brandon's zoning ordinances; and Mr. Robert Morrow, a certified appraiser, testified that the conditions on the subject property could negatively affect values of neighboring properties.

The Chancellor also heard testimony from several of Brandon's employees including Mr. Robbie Powers, who is Brandon's code enforcement official. Mr. Powers testified that Whitley had approximately 46 inoperable, unlicensed, and untagged vehicles on the subject property-with several of these vehicles having been wrecked or in various states of disrepair. 15:10-17, R.E. 110 and 25:6-22, R.E. 116. Mr. Powers testified that the vehicles were not secured so as to prevent children living in adjoining neighborhoods and others from accessing them. 20:6-12, R.E. 20.

As noted herein, the rule of prohibiting the "grandfathering" of a nuisance has been established in multiple jurisdictions in the nation. The Court of Appeals of Wisconsin dealt with the issue in *Town of Delafield v. Sharpley*, 568 N.W.2d 779 (Wis. App. 1997), and ruled that when a determination is made that a public nuisance exists, the property owner has no "grandfather" right to endanger the public. *Id.* at 781. The Supreme Court of Nebraska dealt with an almost identical issue in *Village of Brady v. Melcher*, 502 S.W.2d 458 (Neb. 1993),

and the court found that the property owner had no "vested right, or constitutional privilege, to maintain or continue a nuisance." *Id.* at 462. The Court of Appeals in Ohio dealt with these issues in *City of Stow v. Griggy*, 453 N.E.2d 1125 (Ohio App. 1983), and found that the doctrine of nonconforming use was inapplicable where the activity complained of had been declared a nuisance, even if such use existed prior to the legislative enactment declaring the same a nuisance. *Id.* at 1127.

As more fully developed herein, by overwhelming evidence, the Chancellor found the inoperable vehicles constituted a per se violation of Brandon's ordinances pertaining to inoperable vehicles and a nuisance creating a danger to public health, via both the attraction of vandals (as confirmed by Whitley's own testimony) and the environmental concerns as testified to by Brandon's witnesses.

It is respectfully submitted that the Chancellor did not err in finding that Whitley's storing of the approximately 46 inoperable vehicles on Whitley's property enjoyed no "grandfather" status.

Whitley attacks Brandon's nuisance ordinance as unconstitutionally vague. In this effort Whitley blatantly ignores the explicit notice Brandon gave him before it instituted any judicial proceedings; further, Whitley blatantly ignores that the Chancellor's finding that the conditions maintained on Whitley's property constituted a nuisance were based in a very specific sections of Brandon's nuisance ordinance.

Whitley also incorrectly argues that he was entitled to a supersedeas bond and stay of the Chancellor's order after he filed his Notice of Appeal. This Court has applied MCA Section 11-45-43 (1972 as amended) to situations of harm for which money cannot

adequately compensate the injured party. In *Orkin Extermination Co., Inc. of Memphis v. Posey*, 67 So.2d 526 (Miss. 1953), this Court held that when injunctive relief is sought, the grant of a supersedeas is in the "sound discretion of the [lower] court." *Id.* at 528. In the present case, the Chancellor found that the citizens of Brandon were subject to potential harm for which money would provide no adequate compensation. In this case, the Chancellor fashioned a form of supersedeas which, while requiring Whitley to remove the non-compliant vehicles and related parts, was done at Brandon's expense via Whitley's agent, and also provided for the reimbursement of storage costs by Brandon actually incurred by Whitley in the event he prevailed in this appeal. The decision of the Chancellor not only served to protect Brandon's citizens from the irreparable harm he found, it also provided Whitley a mechanism whereby the subject non-compliant vehicles are being maintained by Whitley's agent during the pendency of this appeal. Whitley's complaint is that he should have been able to keep the vehicles in place pending the appeal. Separate and apart from the discretion granted to chancellors in this respect, in the face of the findings by the Chancellor of irreparable harm and injury (167:28-29 - 168:1-29, R.E. 158-59), and in light of the manner in which the subject non-compliant vehicles were required to be removed and the provisions made therefore, Whitley's argument in this respect is untenable.

harming the public through the maintenance of a such nuisance. It is respectfully submitted that he does not.

A. Nonconforming uses and nuisances

Nonconforming uses and nuisances must be delineated. Mississippi law defines a public nuisance as a use that is unreasonable, unwarrantable, or an unlawful use of a person's property or his improper, indecent, or unlawful conduct that works obstruction or injury to the rights of others or to the rights of the public producing material annoyance, discomfort, inconvenience, or hurt that the law will presume damage to arise therefrom. *Bosrage v. State ex rel. Price*, 666 So.2d 485 (Miss. 1995). A nonconforming use is defined as a "[u]se that is impermissible under current zoning restrictions but that is allowed because the use existed lawfully before the restrictions took effect." Black's Law Dictionary 1577 (Bryan A. Garner, ed., 8th ed. (West 2004).

B. The Chancellor did not err in finding the conditions on Whitley's property to constituted a nuisance

The Chancellor heard extensive testimony and reviewed numerous exhibits demonstrating that Whitley's use of his property constituted a nuisance. The Chancellor heard testimony from Mr. Powers, Brandon's code enforcement official that Whitley had approximately 46 inoperable[8], unlicensed, and untagged vehicles on the subject property-with several of these vehicles having been wrecked or in various states of disrepair. 15:10-17,

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[8] 16:28-29, R.E. 111.

Q. Under Brandon's definition for a vehicle to be operable it must have a license and a tag and run?
A. Yes.

R.E. 110 and 25:16-22, R.E. 116. Mr. Powers testified that the vehicles were considered junk vehicles because "they're inoperable. They're not in use. They've been basically abandoned in a pasture." 15 :25-27, R.E. 110. He testified that the vehicles were not secured so as to prevent children living in adjoining neighborhoods and others from accessing them. 20:6-12, R.E. 112. Further, Mr. Powers testified that Whitley did not have a license to operate a junkyard[9]. 33:12-19, R.E.119. In addition to other ordinances Brandon contended that Whitley was violating by the location of the subject vehicles, Mr. Powers gave testimony regarding Section 302.8 of the International Property Maintenance Code, adopted through Section 18-61 of the City of Brandon's duly adopted ordinances which states:

> **302.8 Motor vehicles.** Except as provided for in other regulations, no inoperative or unlicensed motor vehicle shall be kept or stored on any premises, and no motor vehicle shall at any time be in a state of major disassembly, disrepair, or in the process of being stripped or dismantled. Painting of vehicles is prohibited unless conducted inside an approved spray booth. (Emphasis in the original.)[10]

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[9] Mr. Wade testified that in evaluating the subject property in evaluating the area annexed by Brandon, including the subject property, for zoning purposes, one of the aspects of his work was to evaluate the properties for existing lawful uses. In doing so, he determined that prior to its annexation, no privilege license had been issued by Rankin County for any business enterprise on the subject property, including the operation of a salvage yard. 91:4-14, R.E. 135.

[10] Mr. Powers further testified about other aspects of Brandon's ordinances which Whitley was violating by the location of the inoperable vehicles on the subject property including Sections 415 and 418 of Brandon's ordinances. 22:10-23, R.E. 113; 23: 8-29 - 24:1-6, R.E. 114-15; 45:27-29 - 46:1-2, R.E. 120-21.

Section 415 which provides that "[v]ehicles or trailers of any kind or type which require licenses or state inspection stickers, but are without current license plates or do not have current state inspection stickers affixed to the vehicle or trailer, shall not be parked or stored on any residentially zoned property other than in completely enclosed buildings, nor shall such vehicles be parked on public streets." C.P. 17, R.E. 12.

Section 418 provides that: "[n]o rubbish, salvage materials, junk or hazardous waste

The conditions on Whitley's property clearly met these criteria.

Mr. Robert Morrow, an accepted expert in the field of real estate appraisal, testified that the location of junk cars in the immediate vicinity affects the salability of a home or lot. 62:25-29 - 63:1-3, R.E.125-26. He also testified that conditions on the subject property could negatively affect neighboring properties. Mr. Morrow testified that according to accepted real estate appraisal methodologies, the subject vehicles could cause adjacent property values to be less than they would be without the vehicles present. 54:10-29 - 55:1-3, R.E.123-24.

Mr. George Guest, P.E., was accepted as an expert in the field of engineering to render opinions with regard to geotechnical engineering. Mr. Guest opined that specifically with regard to inoperable vehicles located on the subject property that his concerns in relation to Brandon's ordinances were, *inter alia*, the control of pollutants such as "fuel, oil, antifreeze, . . . asbestos in . . . brakes, mercury in light switches". 66:29 - 67:10-19, R.E. 127-28. Mr. Guest also gave testimony with respect to concerns of these pollutants "leaching" into the ground, and eventually making their way into the groundwater in violation of federal storm water requirements. 67:20-25, R.E. 128 and 68:1-29 - 69:1-10, R.E. 128-129.

In Mr. Guest's opinion the leaching of fluids is one of the reasons that vehicles are supposed to be maintained in an operable condition. Such that with having license tags and passing inspections, problems with leaking oil and other fluids can be determined and

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materials including inoperable vehicles and parts and any combustible matter, shall be openly stored, allowed to accumulate or kept in the open, and no weeds and other growth shall be allowed to go uncut within any district when the same shall be determined by the appropriate city official (the building inspector, fire chief, or other authorized city employee) or health official to constitute a menace to the public health and/or safety. Exhibit P-1 at Section 418, R.E. 163.

corrected. 73:17-25, R.E. 132.

Mr. Guest also testified with respect to Brandon's Illicit Discharge and Connection Ordinance. He testified that by definition the term "hazardous material" meant "any material, including any substance, waste, or combination thereof, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may cause, or significantly contribute to, a substantial present or potential hazard to human health, safety, property, or the environment when improperly treated, stored, transported, disposed of, or otherwise managed". 71:17-23, R.E. 131. Mr. Guest opined that gasoline, oil, antifreeze, brake fluid, and fluids that are normally found in a vehicle would constitute hazardous materials if allowed to run offsite and advised that, "Well, in fact, our ordinance further says that a pollutant is anything which causes or contributes to pollution; and it gives a specific example, oil and other automotive fluids." 71:24-29 - 72:1-5, R.E.131-32. Mr. Guest testified that Brandon's ordinance in this respect mirrored federal law and "in fact DEQ has blessed this ordinance". 72:14-15, R.E. 132.

Mr. Guest further opined that a junkyard, a place where three or more inoperable vehicles are located in any one location, would be categorized as something with a high potential, as opposed to a low or medium potential, for contamination of ground water, to which he responded "[w]ell its high because of the pollutants it generates...or potentially generates" 72:22-29 - 73:1-5, R.E. 132-33.

The conclusion of Mr. Guest's testimony on direct examination makes the presumptive case that the conditions on Whitley's property constituted a nuisance:

Q: . . . [W]ould the location of these vehicles in an inoperable condition

unmaintained create the hazard which would give rise to leaching of fluids from those vehicles into the groundwater?

A: Yes, it would.

Q: Okay. And in relation, back to [Brandon's] nuisance ordinances, would it then injure or endanger the comfort repose, health, or safety of others?

A: Yes, it could.

73:6-16, R.E. 133.

Mr. David Wade, senior planner for the Central Mississippi Planning Development District, was accepted as expert in the field of city planning in relation to zoning, comprehensive plans and municipal uses, testified that Brandon's zoning ordinances would not "grandfather" a nuisance. Mr. Wade gave testimony in response to one of the Chancellor's clarifying questions that squarely addresses the issue as sits today: "Had [Whitley] been an operating a salvage yard that was operating under a privilege license and so on; that would have been a nonconforming use; but simply having abandoned vehicles on a piece of property, I don't think that would be considered a nonconforming use." 102:23-28, R.E. 136.

Mr. Wade confirmed for the Court that it was his responsibility on behalf of Brandon to evaluate the properties recently annexed by Brandon for zoning purposes. One aspect of this evaluation process was to determine what businesses were located in the annexed area and whether they had lawful authority operate. 90:15-29, R.E. 134. Mr. Wade was able to confirm that Rankin County had not issued any privilege licenses for the subject property for the operation of any businesses including a salvage yard. 91:4-14, R.E. 135.

Ms. Amanda Tolstad, the Director of Community Development testified that the ordinances at issue were adopted prior to the annexation of the subject property. 109:11-23,

R.E. 137.

She further testified that she was responsible for the process of revising Brandon's official zoning map to zone the newly annexed area which included the subject property. 110 :16-29, R.E. 138. In evaluating Whitley's property she assigned the use as R-1, low density residential. 110:17, R.E. 138. At that time she determined that its current use was agricultural and such use would be a permitted nonconforming use of the subject property which would include using the property for livestock. 110:16-18 and 111:1-8, R.E. 138-39. She concluded that the inoperable vehicles and the junked cars were not a part of the agricultural operation. 112:12-15, R.E. 140.

Based upon Ms. Tolstad's observations of the property, she was of the opinion that Brandon's ordinances including Section 415[11] and 418 were being violated by Whitley. 113:21-26, R.E. 141. Pursuant to these ordinances, regardless of where the vehicles are located in Brandon, in a residential zoned area, they are required to have current licenses and state inspection stickers and if they do not, to be parked in a fully enclosed area. 114:9-16, R.E. 142. In reviewing the photographs offered in evidence as collective exhibit P-9 she testified that the approximately 46 vehicles located on Whitley's property did not have valid inspection stickers or license tags. 114:17-22, R.E. 142.

She further confirmed that the subject property was not zoned for a junkyard and that

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[11] She further confirmed that Section 302.8 of the IPMC which was adopted by Brandon via Section 18-61 of Brandon's ordinances, mirrored Section 415 of Brandon's ordinances except that Section 415 also required valid inspection stickers. 116:3-10, R.E. 171.

at the time the property was annexed it was zoned by Rankin County for residential use[12] and that under Rankin County's zoning ordinance a junkyard was not an approved use in a residentially zoned district. 115:2-8, R.E. 143.

In reviewing photographs in P-9, she testified that there was nothing therein that would lead her to believe that any of the vehicles were operable and that as the Director of Community Development for Brandon she was of the opinion that these inoperable vehicles posed a risk to the health, safety and welfare of the citizenry because of such things as the shattered glass and scrap engine parts all over the property, the leaking fluids, that the property was not secure and was a breeding ground for vermin, mice, rats and snakes, and that the condition of the subject property with the inoperable vehicles constituted a nuisance. 117:2-12, R.E. 144.

Whitley attempts to portray the testimony of Ms. Tolstad, in a most self-serving manner, by singling out her referral to the subject vehicles as an "eyesore". Appellant's Brief at 18. However, this one word excerpt stands in stark contrast to her entire answer to the pertinent line of questioning:

Q: Why is that illegal? [Referring to unlawful storage of the vehicles.]
A: Because it's a nuisance to the people that live in the vicinity of that area. It's an eyesore.
Q: Wait a minute. Wait a minute. Let's go over two things. What is the nuisance?
A: **The nuisance is the breeding ground for the vermin. It's the pollutants that leak into the ground. It's the – it poses a risk for anyone who comes onto that property because the – the glass and the engine parts – whether they're invited or not invited on the property, it's a risk for anyone and**

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[12] Ms. Tolstad further testified that before being annexed by Brandon and subsequently the subject property was and is being taxed as agricultural use value and not as commercial property. 118:18-28, R.E. 145.

that type of accumulation of junk, it attracts vandalism.

127:5-16, R.E. 127. (Emphasis added).

Whitley confirmed Ms. Tolstad's concerns when he testified that the vehicles at issue had attracted vandals to the subject property.

Q: Okay. You mentioned that last year someone came on your property and vandalized-your vehicles. Is that right?
A: That's right.
Q: Okay.
A: It's listed with the Rankin County Sheriff's Department.
Q: So we can agree, can we not, that vandalism has occurred on your property? Right?
A: Somebody busted out my windows, yes sir.

146:13-22, R.E. 149.

When questioned about a vehicle missing doors, Whitley did not hesitate to attribute such an obvious state of disrepair to vandalism:

Q: Somebody stole the doors off of it?
A: Right.

151:11-13, R.E. 150.

Other jurisdictions have had occasion to establish the rule that a nuisance cannot enjoy "grandfather" status. The Court of Appeals of Wisconsin dealt with the issue in *Town of Delafield v. Sharpley*, 568 N.W.2d 779 (Wis. App. 1997). The town of Delafield filed suit against the owners of property that had in excess of ninety (90) vehicles kept on the property in addition to batteries, radiators, miscellaneous machinery, and other assorted dangerous waste. *Id.* at 782. The Sharpleys' ownership and use of their property predated the town's ordinances defining nuisances. *Id.* at 781. The court stated that "neither the legitimacy of the business nor the length of time it has been existence is controlling in determining whether a

public nuisance exists" (internal citations omitted) and that a public nuisance can always be abated. *Id.* (Internal citations omitted.) The end resulting being that when a determination is made that a public nuisance exists, the property owner has no "grandfather" right to endanger the public.

The Supreme Court of Nebraska dealt with an almost identical issue in *Village of Brady v. Melcher*, 502 S.W.2d 458 (Neb. 1993). In *Brady*, a municipality had enacted an ordinance on August 11, 1983, stating that "No person in charge or control of any property within the Municipality, other than Municipal property. . . shall allow any partially dismantled, inoperable, wrecked, junked, or discarded vehicle to remain on such property longer than thirty (30) days." *Id.* at 461. This ordinance was contested on, *inter alia*, the fact that some of the junk vehicles at issue had been present on the property prior to the municipality's adoption of the ordinance. *Id.* at 462. The court found that the property owner had no "vested right, or constitutional privilege, to maintain or continue a nuisance." *Id.* citing *City of Saint Lyons v. Betts*, 171 N.W.2d 792 (Neb. 1969).

The Court of Appeals in Ohio dealt with these issues in *City of Stow v. Griggy*, 453 N.E.2d 1125 (Ohio App. 1983). The City of Stow enacted Section 136.02 which provided that "if one stores upon his property 'motor vehicles unfit for further use,' he must enclose them 'within a fence or building suitable to obstruct the same from public view and access'". *Id.* at 1126. Griggy argued that his storage of automobiles which fell into the aforementioned category predated the ordinance, and the use of his property was not subject to Section 136.02 as it constituted a nonconforming use. *Id.* at 1127. The Ohio court found that the doctrine of nonconforming use was inapplicable where the activity complained of had been declared a

nuisance, even if such use existed prior to the legislative enactment declaring the same a nuisance. *Id.* (Internal citations omitted.)

In a Bench Opinion that encompasses approximately 12 pages of the transcript of the Record in this matter (157 - 169) the Chancellor went to great lengths to identify the specific facts as generally described herein giving rise to his finding in favor of Brandon. The Chancellor's ruling was clearly supported by the evidence and should be affirmed by this Court.

C. Appellant's Assignment of Error Number Two

Whitley's Assignment of Error No. 2 is made up of several issues including what appears to be a contention by Whitley's, for this first time, of immunity under MCA Section 95-3-29[13] (1972 as amended) the so-called *Right to Farm* statute[14]. Setting aside for the moment Whitley's failure to plead such immunity in his Answer (C.P. 49, R.E. 172-182) there is nothing remotely related to Whitley's use of the property as a farming operation in the case *sub judice*. Brandon has made no attempt to curtail or in any way restrict Whitley's farming operation. Moreover, *assuming arguendo* that the statute somehow applied to the facts in this matter, which is denied, and assuming that Whitley had asserted such as an

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[13] Cited in Whitley's brief on page 12, as MCA 49-17-29 (1972 as amended).

[14] Whitley has never been issued a criminal citation by Brandon in this respect nor has he sought civil relief against Brandon in this respect. Mr. Powers testified that none of the citations issued to Whitley were connected with his farming operation. (33:3-7, R.E. 119). Brandon's Complaint in this matter never once speaks to anything other than the accumulation of inoperable vehicles. (C.P. 6, R.E. 1). There is absolutely nothing in the record by any witness presented by Brandon even remotely suggesting any intent to halt Whitley's farming operations. To the contrary, much is discussed by Mr. Wade and Ms. Tolstad about acknowledging Whitley's farming operation prior to Brandon's annexation and its continuation as a non-conforming use thereafter.

affirmative defense in his Answer or had asserted such after Brandon rested its case, which he did not (132:15-20, R.E. 147), or at the conclusion of his case which he did not (156:28-29 - 157:1-3, R.E. 151-52), the fact of the matter is that the issue has been and remains inoperable vehicles and not "farm machinery, equipment, devices, chemicals, products for agricultural use, materials and structures designed for agricultural use and used in accordance with traditional farm practices". *See* MCA 95-3-29 (2)(a) (1972 as amended).

Before continuing to address Whitley's Assignment of Error No. 2, it must be brought to the Court's attention that the Chancellor specifically did not find that a nuisance existed pursuant to Section 34-21(3) of Brandon's nuisance ordinance (162:5-18, R.E.155) even though Whitley addresses the subject in his brief as if the Chancellor had done so. *See* Appellant's Brief at "Error Number Two".

Brandon's ordinance is not unconstitutionally vague nor is it ambiguous. Whitley claims in his brief that Brandon's witnesses all had varying definitions of the term "nuisance" as used in Brandon's ordinances, but in doing so, Whitley blatantly ignores that the Chancellor's finding that the conditions maintained on Whitley's property constituted a nuisance were based in Section 34-21(1). The Chancellor read the exact language of Section 34-21(1) when finding that such: "I think the City has established abundantly that the holding, the storage, the presence of the cars on the property owned by Mr. Whitley constitute a nuisance under the City's statutes. The nuisance constitutes any act or condition or thing that, one, injures or endangers the comfort, repose, health or safety of other." 160:18-29,

R.E. 153.[15] The Chancellor then went on to state that he was making no finding with respect to Sections 34-21(2) and 34-21(3) because he found these to be subjective, but that the health and safety issues were abundantly clear. 162:5-18, R.E. 155.

As noted by Whitley, this Court addressed vague ordinances in *Mayor and Board of Aldermen City of Clinton, Mississippi v. Welch*, 888 So.2d 416, 421 (Miss. 2004) and stated: "A governmental enactment is impermissibly vague where it fails to provide persons of ordinary intelligence a reasonable opportunity to understand what conduct is prohibited." Moreover in *Richmond v. City of Corinth,* 816 So.2d 373 (Miss. 2002), the Court citing *Loden v. Mississippi Pub. Serv. Comm'n*, 279 So.2d 636, 640 (Miss. 1973), determined that "[i]f possible, courts should construe statutes so as to render them constitutional rather than unconstitutional if the statute under attack does not clearly and apparently conflict with organic law after first resolving all doubts in favor of validity. And further, that "[s]tatutes have a presumption of validity overcome only by showing unconstitutionality beyond a reasonable doubt". *Id.* at 373. (citing *Corry v. State*, 710 So.2d 853, 859 (Miss. 1998) and *Nicholson ex rel. Gollott v. State*, 672 So.2d 744, 750 (Miss. 1996). In *Richmond*, the Court held that a statute is not void for vagueness if individuals of common intelligence are not required to guess at its meaning or reasonably differ as to its application. *Id.* at. 377. The

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[15] As provided in Section 34-22 of Brandon's nuisance ordinance (C.P. 32, R.E. 27), certain illustrative enumerations of what constitutes a nuisance are provided. As testified by Mr. Powers, there were at least four of the enumerated items which constituted a nuisance in this case, to-wit: "(1) Noxious weeds and other rank vegetation. (2) Accumulations of rubbish, trash, refuse, junk and other abandoned materials, metals, lumber or other things. (3) Any condition which provides harborage for rats, mice, snakes and other vermin. (10) Any accumulation of stagnant water permitted or maintained on any lot or piece of ground. 27:15-29 - 28:1-17, R.E. 117-18.

Court went on to note that assuming the statute is unclear or ambiguous, which is denied in the case *sub judice*, the Court may look beyond the language used to determine statutory intent, including historical background, its subject matter and the purposes and objects to be accomplished. *Id.* at. 378.

In *Richmond*, the Court held the indecent exposure statute was not void for vagueness even though the terms "lewdly," "person," private parts," and "public place," were not defined in the statute. *Id.* at. 378. In the case at bar, the Chancellor's finding that the vehicles on kept on Whitley's property rested in part on subsection (1) of Brandon's nuisance ordinance which provides that a nuisance constitutes any act or condition or thing that, one, injures or endangers the comfort, repose, health or safety of others. This language is not vague as it grants a person of ordinary intelligence the opportunity to recognize they are not allowed to endanger the public, in this case, be it through having unguarded personalty on real property that attracts vandals, harboring standing water[16] in which mosquitoes may breed (spreading meningitis or West Nile Disease), or maintaining an unlicensed junkyard from which pollutants may leach into groundwater. Moreover, unlike someone who is charged with a violation without notice, in this case, Whitley was fully informed of the specific issues pertaining to his property by a letter sent to him before any formal action, criminal or civil, was pursued by Brandon. In the letter from Brandon to Whitley dated July 11, 2007 (C.P. 30, R.E. 25), Whitley was specifically advised of certain ordinances that Brandon contended were being violated. In the letter, Mr. Powers, on Brandon's behalf, writes to Whitley:

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[16] Mr. Powers testified regarding the propensity to of standing water to harbor vermin and dangerous creatures. 28:3-16, R.E. 118.

> I drove past the above mentioned parcel [the subject property where the vehicles are located)[17] and noticed many vehicles being kept or stored which looked to be inoperable or abandoned. Per City ordinances, parking or vehicles and trailers of any kind is restricted to driveways in residential areas. All vehicles and trailers shall have current tags and inspection stickers. All vehicles kept or stored on the property shall be in an operable condition, kept in a completely enclosed area or removed from the property. I respectfully request your immediate assistance in handling this matter. I am available for further discussion.
>
> *****
>
> As directed, the above mentioned violation must be corrected; or, a "request for hearing" must be made be calling the Department of Community Development within **30 days**.
>
> Should you neglect to respond to this notice, the City shall issue a ticket or shall abate said violation and assess the cost thereof to said persons.

Even assuming ambiguity, which is denied, any claim by Whitley that he did not have reasonable knowledge of the violative conduct is disingenuous at best. There was no ambiguity in the letter he received. He knew when he received the letter. He knew during the time he was given to remedy the situation before any charges were filed but did nothing. He knew when he went to Brandon Municipal Court on the citations that were issued after he failed to comply, or seek a hearing or otherwise communicate with Brandon. He knew after he was found guilty and paid a fine and before this action was filed, and he knew by the four corners of the Complaint filed in this matter by Brandon.

THE CHANCELLOR DID NOT ERR IN DENYING WHITLEY SUPERSEDEAS BOND

Before addressing this issue, it must be pointed out that Whitley failed to have the transcripts of any of the post-trial hearings made a part of the record before this Court. As such, it is respectfully submitted that the issues asserted in Whitley's Assignment of Error

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[17] *See* Exhibit P-8, R.E. 164.

No. 3 cannot be properly addressed. However, without waiving such objection, Brandon will provide a response to the extent possible, given the limited record.

At the onset, a factual inaccuracy asserted by Whitley must be addressed. Whitley asserts that during his incarceration for contempt of the Chancellor's orders, Brandon "proceeded to move the appellant's cars and various farm equipment from the appellant's private farm and storage area." Appellant's Brief at 30. As is reflected in the Supplemental Order dated February 21, 2008 (C.P. 124, R.E. 94) and the Order dated March 11, 2008, (C.P. 134, R.E. 98) the Chancellor directed Brandon to pay the sum of $1250.00 to ACE Auto Sales for the cost of removal of all non-compliant vehicles and related parts in accordance with the estimate provided by Whitley's witness James Tate and as testified by Mr. Tate. Brandon did not retain ACE Auto Sales or Mr. Tate nor did it control the work as ordered by the Court. In fact, at no time did anyone working for or affiliated with Brandon enter upon the property to assist or in any way or participate in the removal of the non-compliant vehicles and related parts from Whitley's property. Although Brandon did file a motion to enter Whitley's property to abate the nuisance (C.P. 139-145, 101-107), a hearing was never held on the same, and, upon the information and belief, it was Whitley's agent, Mr. Tate who entered onto the land with the assistance of others, removed the vehicles constituting the nuisance.

A. MCA Section 11-45-43 and *Orkin Exterminating Co. of Memphis v. Posey*

MCA Section 11-45-43 (1972 as amended) provides:

> In any case of an appeal to the supreme court, where no special provision is made by law for a supersedeas of the judgment or decree appealed from, or for the bond to be given in such case, a supersedeas may be allowed by the court rendering the judgment

> or decree appealed from or by the judge thereof, or by the supreme court or any of the judges of said court, upon such bond, with such sureties as said court or judge may direct in the order for a supersedeas.

The Court has applied this statute to situations of harm for which money cannot adequately compensate the injured party. In *Orkin Extermination Co., Inc. of Memphis v. Posey*, 67 So.2d 526 (Miss. 1953), it is stated that when injunctive relief is sought, the grant of a supersedeas is in the "sound discretion of the [lower] court." *Id.* at 528.

In the present case, the Chancellor found that Brandon was subject to harm for which money would provide no adequate compensation. In particular, the Chancellor found that there was uncontradicted testimony that the nuisance on Whitley's property was a hazard to the health and safety of the citizens of Brandon. 160:11-29 - 161:1-16, R.E. 153-54 and 167:28-29 - 168:1-12, R.E. 158-59. Even so, in this case, the Chancellor fashioned a form of supersedeas which while requiring Whitley to remove the non-compliant vehicles and related parts, was done at Brandon's expense via Whitley's agent, and also provided for the reimbursement of storage costs by Brandon actually incurred by Whitley in the event he prevailed in this appeal. The decision of the Chancellor not only served to protect Brandon's citizens from the irreparable harm he found, it also provided Whitley a mechanism whereby the subject non-compliant vehicles are being maintained by Whitley's agent during the pendency of this appeal. Whitley's complaint is that he should have been able to keep the vehicles in place in their then condition pending the appeal. Separate and apart from the discretion granted to chancellors in this respect, in the face of the findings by the Chancellor of irreparable harm and injury (167:28-29 - 168:1-29, R.E. 158-59), and in light of the

manner in which the subject non-compliant vehicles were required to be removed and the provisions made therefore, Whitley's argument in this respect is untenable.

VI. CONCLUSION

It is respectfully submitted that the Chancellor did not err in granting Brandon injunctive relief. The evidence and testimony presented at trial was overwhelming and clearly established justification for the Chancellor's ruling.

As the evidence and testimony demonstrated the clear potential for harm to the citizens of Brandon, the Chancellor did not abuse his discretion in with respect to Whitley's request for a stay and supersedeas bond after his Notice of Appeal of was filed.

It is respectfully submitted that for these reasons, and for all reasons that chancellors are affirmed and such appeals are denied that the Chancellor's rulings in this matter should be affirmed in all respects.

Respectfully submitted,

City of Brandon, Mississippi, Appellee

BY: _____
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CERTIFICATE OF SERVICE

I, MARK C. BAKER, SR., one of the attorneys for Brandon, do hereby certify that I have this day mailed, postage prepaid, via United States Mail, a true and correct copy of the above and forgoing to Hon. Dan Fairly, Chancellor, P.O. Box 1437, Brandon, Mississippi 39043 and Harry J. Rosenthal, Esq., 834 West Capitol Street, Jackson, MS 39203.

THIS, the 5th day of August, 2008.

MARK C. BAKER, SR.