

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. STATEMENT OF THE CASE AND FACTS	2
III. WHY THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT RAISE A SUBSTANTIAL CONSTITUTIONAL QUESTION	5
IV. ARGUMENT.....	8
Response to Appellants’ proposition of law:	8
V. CONCLUSION.....	11
VI. CERTIFICATE OF SERVICE	12

INTRODUCTION

Further review in this case is unneeded because this Court's precedents already answer (and reject) the arguments raised in the jurisdictional memorandum. This appeal has no constitutional dimension and presents no conflict (or even variations) among the courts of appeals applying this Court's precedents. This Court should decline jurisdiction.

In this nuisance-abatement action, the trial and appellate courts simply did what the relevant statutes command when they found a nuisance and imposed a closure order on the offending property. The statutes make no room for general equitable principles because the statutes create a cause of action to abate nuisances. This Court has repeatedly affirmed that principle and this case provides no reason to revisit it. As the Seventh District recognized, this appeal "essentially" seeks a decision that the "trial court's decision was against the weight of the evidence." But even reading the appeal more expansively as a request to examine the limits of nuisance-abatement injunctions against innocent owners does not offer a reason to grant review. The owner here can make no legitimate claim to innocence as to drug sales that occurred on her property. So this case offers no chance to revisit the topics that divided this Court in *State ex rel. Pizza v. Rezcallah*, 84 Ohio St.3d 116, 702 N.E.2d 81 (1998).

In this case, the existence of a nuisance on the premises of Shadyside Party Center (hereafter "Shadyside"), was established. *State ex rel. DeWine v. Shadyside Party Center, et al.*, 7th Dist. No. 13 BE 26, 2014-Ohio-2357, ¶ 17 (hereafter "App. Op."). The owner of Shadyside, Stacey Heathcote (hereafter "Heathcote"), was found to have committed and participated in felony drug trafficking violations of R.C. §2925.03 that constituted the nuisance. *Id.* Pursuant to provisions in R.C. Ch. 3767, Heathcote was permanently enjoined from maintaining the nuisance on her property and "[t]he court ruled that Shadyside Party Center shall be closed for any

purpose and remain closed for a period of one year unless sooner released.” App. Op. at ¶ 18.

Clear and convincing evidence proved Heathcote’s non-innocence.

Ms. Heathcote was aware of the nature of the products considering the totality of the circumstances: police informed her they may be illegal, she knew people were smoking the products even though the packets said not to, the disparity in price, the volume of sales, the uncommon practice of a supplier providing a lab report testing for illegal substances, the explicit warning letter from the prosecutor that the labels on these products about legality are almost always false, the letter immediately caused her to remove the products, and then she decided “on second thought” to try to keep selling the products by hiding behind her lawyer’s alleged advice (also finding that even the alleged advice did not dispel her awareness that circumstances probably exist that the product was illegal).

App. Op. at ¶ 18.

Straightforward principles of public nuisance abatement law that have been thoroughly considered and applied by this Court in previous nuisance-abatement actions involving alcohol sales, adult bookstores, and drug sales, apply here. There is nothing novel or new about this case. The appellate decision upholds the state’s ability to abate felony drug related nuisances at properties where the property owner is not an absentee owner, knowledge on the part of the property owner is proven, and clear and convincing evidence shows that the property owner allowed the nuisance to continue unabated by turning a blind eye to the nuisance.

The facts in this case are narrow, the appellate decision is correct, and there is no error below. This Court should deny jurisdiction.

STATEMENT OF THE CASE AND FACTS

This is a public nuisance-abatement action directed at the sale of illegal synthetic drugs from a retail business. Ohio Attorney General Michael DeWine brought a civil nuisance abatement action against Shadyside and Heathcote under Ohio’s public nuisance laws and the Consumer Sales Practices Act. Complaint, ¶¶ 72-85.

Shadyside attracted the attention of law enforcement because certain “incense” and “potpourri” products Heathcote sold out of Shadyside were suspected to contain illegal synthetic drugs. Trial Opinion at ¶ 2 (hereafter “Trial Op.”). To investigate, a Special Agent with the Ohio Bureau of Criminal Identification and Investigation (BCI&I), acting in an undercover capacity, went to Shadyside to purchase these products. State’s Ex. 1. On one occasion, Heathcote herself sold packets of the products to the Agent. *Id.* She did not complete the \$45.00 transaction on a cash register. *Id.* The Agent submitted the packets for testing, which revealed XLR11,¹ a Schedule I Controlled Substance. State’s Exs. 2, 3.

While this testing was in progress, the Belmont County Prosecutor sent Heathcote a letter advising her that, “[t]he Belmont County Drug Task Force has brought to our attention that you may be selling synthetic marijuana, incense, or bath salts that are being smoked or ingested by your patrons.” Transcript at p. 57 (hereafter “Tr.”). The letter urged Heathcote to stop selling the products because “most if not all of these products do contain illegal substances.” Defendant’s Ex. 3; Tr. at pgs. 57-58. Heathcote initially removed the products from Shadyside’s shelves, but resumed selling them after consulting her business attorney and having him write a response letter to the Prosecutor. Tr. at pgs. 94-95.

After Heathcote resumed selling the products, the undercover Agent returned to Shadyside and bought nine packets of the products for \$250.00. *Id.* He submitted the packets for testing, which again revealed the presence of XLR11 in each packet. State’s Exs. 4, 5. A week

¹ XLR11 is the abbreviated name for the chemical compound [1-(5-fluoropentylindol-3-yl)]-(2,2,3,3-tetramethylcyclopropyl)methanone.

later, pursuant to a warrant, all similar products at Shadyside were seized. Tr. at p. 40. The Attorney General filed a nuisance-abatement suit the same day. Complaint.

The trial court held a hearing and found clear and convincing evidence:

that the defendants committed and participated in committing felony drug trafficking violations of R.C. 2925.03 and were thus liable for maintaining a nuisance under R.C. 3719.10. The court further found that the nuisance was subject to abatement. The court found that Ms. Heathcote was aware of the nature of the products considering the totality of the circumstances ***. The court permanently enjoined the defendants from maintaining a nuisance in the state by selling controlled substances such as “incense” and “potpourri.” The court ruled that Shadyside Party Center shall be closed for any purpose and remain closed for a period of one year unless sooner released.

Shadyside Party Center, at ¶¶ 17, 18. Appellants secured a stay of execution (which remains in place) and appealed.

The Seventh District affirmed the trial court’s finding that clear and convincing evidence showed “that appellant committed and participated in the felony violations of the drug trafficking statute and had knowledge of the illegal substance.” App. Op. at ¶¶ 42, 47. The Seventh District dismissed any claim that Heathcote was an innocent owner: “This is not a case involving a property owner who was not the seller of the drugs. Appellant was the seller who did a brisk trade in the substance at a highly inflated price.” App. Op. at ¶ 43. The Seventh District elaborated:

Although appellant believes it is not, the matter here is one of weight, credibility, and rational inferences. Appellant’s argument on good faith in relation to the necessity of a closure order essentially asks us to find that the trial court’s decision was against the weight of the evidence on the issue of whether this case involved an **“owner who did not negligently or knowingly acquiesce to, and did not participate in the creation or perpetuation of the nuisance.”**

App. Op. at ¶ 47, quoting *Rezcallah*, 84 Ohio St.3d 116 at ¶ 2 of syllabus (Emphasis added by appellate court). Shadyside and Heathcote now seek further review in this Court.

**WHY THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND
DOES NOT RAISE A SUBSTANTIAL CONSTITUTIONAL QUESTION**

Nothing in this appeal raises a substantial constitutional question nor is it a matter of public or great general interest.

The Seventh District decision is consistent with the statutes governing injunction in a public nuisance-abatement action. This Court has already interpreted those statutes in context of several kinds of nuisances. (*Rezcallah*, 84 Ohio St.3d 116 - drug sales on premises of absentee property owner; *State ex rel. Miller v. Anthony*, 72 Ohio St. 3d 132, 647 N.E.2d 1368 (1995) - drug sales); (*State ex rel. Rear Door Bookstore v. Tenth Dist. Court of Appeals*, 63 Ohio St.3d 354, 588 N.E.2d 116 (1992) - adult bookstore). And this Court's cases already address the core question raised in the appeal—do common-law principles of equity apply in statutory nuisance actions. The plain answer is no. Established case law from this Court already addresses the appropriateness of an injunction issuing where a government agent has sought an injunction to enforce public policy under a statute that is specifically designed with a means for doing so without the need for a trial court to balance the equities before issuing the injunction. *Ackerman v. Tri-City Geriatric & Health Care, Inc.*, 55 Ohio St.2d 51, 57-58, 378 N.E.2d 145 (1978). Contrary to the suggestion of Appellants, there is no need for this Court to revisit or modify its holding in *Ackerman*.

This Court in *Rezcallah* stated that, “*Ackerman* clearly states that ‘statutory injunctions should issue if the statutory requirements are fulfilled.’ ” *Rezcallah* at 123, quoting *Ackerman* at 57. This Court further stated in *Ackerman*:

Moreover, it is the majority rule in federal courts and the law in a growing number of state jurisdictions that, where an injunction is authorized by a statute designed to provide a governmental agent with the means to enforce public policy, “no balancing of equities is necessary.”

Ackerman at 56 (citations omitted).

Given the fact that statutory actions granting governmental agents the right to sue for injunctive relief have a history and purpose different from equitable actions for injunctive relief, we find the rule that statutory injunctions should issue if the statutory requirements are fulfilled to be appropriate ***. Unlike equitable-injunction actions which were developed in response to a rigid and often inadequate common-law system for redressing non-violent wrongs suffered by one individual at the hands of another.

Ackerman at 56-57.

This Court held in *Rezcallah*:

We have previously held that “it would be inappropriate to balance the equities or require the [state] to do equity in [a statutory] *** injunction action because *** injunctions which authorize a governmental agent to sue to enjoin activities deemed harmful by the General Assembly are not designed primarily to do justice to the parties but to prevent harm to the general public.

Rezcallah at 123, quoting *Ackerman* at 57. The Seventh District decision is another example of the faithful application of well-defined principles set down by this Court in *Ackerman*.

The plain language of R.C. Ch. 3767 also refutes the notion that a court should import common-law equitable principles into statutory nuisance actions. In several places, the statute imposes mandatory commands—not equitable balancing—on trial courts.

R.C. 3767.02 provides that “[a]ny person who uses, occupies, establishes, or conducts a nuisance ***, and the owner *** of any interest in such nuisance *** is guilty of maintaining a nuisance and shall be enjoined as provided in sections 3767.03 to 3767.06, inclusive, of the Revised Code.” (Emphasis added.). ***

Rezcallah at 121. Under R.C. §3767.03, if a nuisance abatement action is initiated and the complainant files an application for a temporary injunction under R.C. §3767.04 and:

following a hearing, the judge is satisfied that the allegations of the complaint are sustained, and unless the owner or person in control of the nuisance has satisfied the court that the nuisance has been abated or that the owner acted immediately to enforce his or her rights under R.C. 3767.10, the court shall issue an order closing the place against its use for any purpose *** until a final decision has been reached on the complaint. R.C. 3767.04(B)(3).

Id. Under R.C. §3767.05(D):

the existence of a nuisance is to be determined “upon the trial of [a] civil action,” and, if the existence of a nuisance is admitted or established in that civil action, the court “shall” enter judgment that “perpetually enjoins the defendant and any other person from further maintaining the nuisance at the place complained of and the defendant from maintaining the nuisance elsewhere.”

Rezcallah at 122 (quoting statute). Under R.C. §3767.06(A), “where the owner has not provided a bond prior to the trial on the merits, and where no prior closure order was issued against use of the property, the order also “shall” direct closure of the real property against use for any purpose for one year.” *Id.* Thus, even if equitable principles did apply here, which they do not, equitable principles would not provide a reason for this Court to grant review given the mandatory commands found throughout R.C. Ch. 3767.

Finally, review is unwarranted because the appeal seeks answers about the statute as applied to innocent property owners, but this Court has already addressed that question and appellants in this case are anything but innocent owners. As this Court has explained, even if a court finds the existence of a nuisance, if the property owner is found to be an innocent owner without knowledge of the nuisance, the one-year closure period is not applicable. *Rezcallah* at 120. Any questions about the scope of the *Rezcallah* defense are irrelevant here because as the Seventh District found, “[u]nder the totality of the circumstances, a lack of culpability under the *Rezcallah* case is not a legal question that can be answered in appellant’s favor with no deference to the trial court (as appellant suggests.)” App. Op. at ¶ 46.

The Seventh District decision is consistent with existing case law that upholds injunctive relief against a nuisance when knowledge is proved on the part of the property owner. The appellate decision does nothing to contravene this Court’s interpretation of R.C. Ch. 3767. The appellate decision maintains the chapter’s enforceability and effectiveness. In short, the appellate

decision reinforces the state's ability to abate nuisances at properties where the owner is not an absentee owner and knowledge on the part of the property owner is proved.

ARGUMENT

Response to Appellants' proposition of law:

A court of common pleas must close a property used to perpetuate a nuisance when the property owner is not innocent of the nuisance.

The statutes creating a cause of action for nuisance-abatement mandate what the courts did below. And this Court's existing precedent incorporates an innocent-owner defense into the statute. There is no room—and no need—for any change to the statutes through the sort of judicial lawmaking that Heathcote seeks in this appeal.

This Court stated in *Rezcallah*:

It bears emphasis that R.C. 3767.06(A) mandates the issuance of an order directing the closure of property upon which a nuisance has been maintained against its use for *any purpose*. The statute does not allow for judicial discretion in the imposition of the order, nor does it require proof of any knowledge or culpability on the part of the property owner before it may be imposed. Release from the closure order may be obtained only where the owner files a bond for the *full value* of the property, *and* pays all costs, *and* the owner immediately abates the nuisance, *and* if the court is satisfied of the owner's good faith. R.C. 3767.04(C).

Rezcallah at 124. (Emphasis added by this Court).

The trial court here found “the defendants participated in and committed the felony violations and were aware that the products were illegal.” App. Op. at ¶ 47. The Seventh District held that:

Although appellant believes it is not, the matter here is one of weight, credibility, and rational inferences. Appellant's argument on good faith in relation to the necessity of a closure order essentially asks us to find that the trial court's decision was against the weight of the evidence of the issue of whether this case involved an “**owner who did not negligently or knowingly acquiesce to and did not participate in the creation or perpetuation of the nuisance.**” *Rezcallah*, 84 Ohio St.3d 116 at ¶ 2 of syllabus (emphasis added). *See also id.* at

94. (no closure if “owner acted in good faith, was innocent of any acquiescence to or participation in the conduct establishing the nuisance, and took prompt action to abate the nuisance.”).

App. Op. at ¶ 47, quoting *Rezcallah* at 94. The Seventh District further held that, “[a] rational fact-finder could conclude that appellant’s situation was not similar to the defendants’ situation in *Rezcallah* and does not fit the test set forth therein.” App. Op. at ¶ 48. Heathcote was “not an owner that fit under the *Rezcallah* test, [thus] the trial court had a mandatory statutory duty to order the closure after finding a nuisance regardless of whether the drug sales were still occurring at the time of the complaint or the time of trial.” App. Op. at ¶ 50, citing *State ex rel. Miller v. Anthony*, 72 Ohio St. 3d 132, 647 N.E.2d 1368 (1995). The trial court’s fact-finding of a nuisance at Shadyside, coupled with its finding that Heathcote was not an innocent owner, triggered the mandatory one-year closing under R.C. §3767.06(A).

Shadyside and Heathcote resist that conclusion by inventing a “notification” responsibility for law enforcement. Shadyside and Heathcote suggest that a nuisance injunction is unavailable unless law enforcement tests products that may contain illegal substances and informs the seller of the results first. Shadyside and Heathcote offer this notification theory as a reason for this Court to “revisit and modify its holding” in *Ackerman* regarding the applicability of equitable doctrines in statutory nuisance actions. Appellant’s Memorandum in Support of Jurisdiction at p. 5. The Seventh District, however, accurately applied *Ackerman*.

The Court stated that where the statutory conditions exist, the traditional equity principles are not also applicable and the party requesting an injunction is not bound by the rules of equity. *Id.* at 56-57. The Court pointed out that statutory actions granting governmental agents the right to seek injunctive relief have a history and purpose different from equitable actions for injunctive relief. *Id.* at 57 (statutory injunction to benefit society by proscribing behavior which the legislature finds is against the public interest).

App. Op. at ¶ 30. This case is no different from the other cases involving nuisance abatement under R.C. Ch. 3767 in which this Court has applied its holding in *Ackerman* and rejected the idea that common-law equity principles restrict statutory nuisance remedies.

Appellants' notification theory also suggests that Heathcote is innocent owner and the injunction is therefore improper if it does not account for her innocence. This Court's seminal case on the subject of nuisance abatement actions, *Rezcallah*, already establishes an innocent-owner defense, which the lower courts here considered and rejected. In *Rezcallah*, this Court stated:

We hold * * * that the mandatory closure provisions of R.C. 3767.06(A) do not substantially advance [the prevention of illegal drug activity] when imposed against property owners who have not acquiesced to *or* participated in the illegal activity, and who have promptly abated the nuisance upon its discovery. * * *

Rezcallah at 129, 702 N.E.2d at 88 (Emphasis added). This Court further stated in *Rezcallah*:

if, despite, a finding of guilt, the court determines that a defendant owner acted in good faith, was innocent of any acquiescence to *or* participation in the conduct establishing the nuisance, and took prompt action to abate the nuisance, no closure order shall be issued under R.C. 3767.06(A) and no tax shall be imposed pursuant to R.C. 3767.09.

Id. at 132. (Emphasis added).

Here, the Seventh District specifically held “that appellant committed and participated in the felony violations of the drug trafficking statute and had knowledge of the illegal substance.” App. Op. ¶¶ 42, 47. It held that “[t]his is not a case involving a property owner who was not the seller of the drugs. Appellant was the seller who did a brisk trade in the substance at a highly inflated price.” App. Op. at ¶ 43. Heathcote is not an innocent property owner. Relabeling the innocent owner defense as “unclean hands” does not hide Heathcote’s culpability.

One last twist. Appellants argue that an injunction cannot issue if the nuisance has ceased before the court closes the property. The statute firmly rejects that notion. Voluntary cessation of a nuisance would rob the court of ever issuing an injunction if appellants were right.

Appellants argue that emphasis should be put on the word “occurs” in R.C. §3719.10, but there is nothing ambiguous about the use of the word “occurs” as it is used in that section. As the Seventh District explained, “the trial court had a mandatory statutory duty to order the closure after finding a nuisance regardless of whether the drug sales were still occurring at the time of the complaint or the time of the trial.” App. Op. at ¶ 50, citing *Miller*, 72 Ohio St. 3d 132. Nothing in statutory language of R.C. §3767.06 (A) provides an “out” from the imposition of the one-year closure if the nuisance is abated by the time of the full injunction hearing.

Compare that section, however, to R.C. §3767.08. Under R.C. §3767.08, if the nuisance is abated (even by the non-innocent owner) by the time of the full injunction hearing the imposition of the tax is discretionary. The absence of a similar exemption from closure means that Appellants’ reading of R.C. Ch. 3767 cannot be right.

What matters here is that felony drug violations *did* occur on Shadyside property, Heathcote turned a blind eye to the illegal activity, and the nuisance continued at Shadyside until law enforcement authorities seized all of the products Appellants possessed that contained an illegal substance. (Emphasis added). The trial and appellate courts followed the statute and correctly concluded that the totality of the circumstances mandated a one-year closure of Shadyside.

CONCLUSION

This is a clear-cut case with little import to anyone besides the parties. The Seventh District decision is correct; therefore, jurisdiction should be denied.

Respectfully submitted,

MICHAEL DEWINE (0009181)
Ohio Attorney General



CHARISSA D. PAYER (0064452)

**Counsel of Record*

Principal Assistant Attorney General
Health and Human Services Section
30 East Broad Street, 26th Floor
Columbus, Ohio 43215
614.466.8600 (telephone)
866.473.4885 (facsimile)
Charissa.payer@ohioattorneygeneral.gov

MELISSA G. WRIGHT (0077843)

Assistant Section Chief
Consumer Protection Section
30 East Broad Street, 14th Floor
614.466.8169 (telephone)
866-528-7423 (facsimile)
Melissa.wright@ohioattorneygeneral.gov

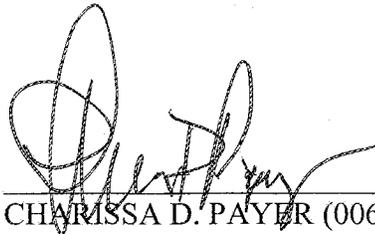
Counsel for Appellee

CERTIFICATE OF SERVICE

The undersigned certifies that a true and accurate copy of the foregoing was served upon the following via U.S. Mail this 6th day of August, 2014:

Dennis W. McNamara
McNamara Law Office
88 East Broad Street – Suite 1350
Columbus, Ohio 43215

Counsel for Appellants



CHARISSA D. PAYER (0064452)

**Counsel of Record*

Counsel for Appellee