

IN THE SUPREME COURT OF FLORIDA

CASE NO.
L.T. NO. 3D04-3256

GOODYEAR TIRE & RUBBER COMPANY,
a Foreign Corporation,

Petitioner,

v.

RONNIE JONES and SYLVIA JONES,
his wife,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

PETITIONER'S BRIEF ON JURISDICTION

KATHLEEN M. O'CONNOR
Florida Bar No. 333761
FREDERICK J. FEIN
Florida Bar No. 813699
THORNTON, DAVIS & FEIN, P.A.
Attorneys for Appellee
Brickell BayView Centre, Suite 2900
80 S.W. 8th Street
Miami, Florida 33130
Tel: (305) 446-2646
Fax: (305) 441-2374

THORNTON, DAVIS & FEIN, P.A., ATTORNEYS AT LAW

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STATEMENT OF THE CASE AND FACTS

Plaintiff below, Ronnie Jones, sued The Goodyear Tire and Rubber Company (“Goodyear”), alleging he was injured by a Goodyear tire. (App. 2).¹ After a jury verdict in plaintiffs’ favor, the trial court directed a verdict in Goodyear’s favor and granted a new trial. (App. 3). On appeal, the Third District reinstated the jury verdict and ordered that a confidentiality order be vacated pursuant to the Sunshine in Litigation Act (“Sunshine Act”), § 69.081, Fla. Stat. (App. 3). *See Jones v. Goodyear Tire & Rubber Co.*, 871 So. 2d 899 (Fla. 3d DCA 2003), *rev. denied*, 886 So. 2d 227 (Fla. 2004).

On remand, Goodyear sought a hearing and in-camera inspection of the confidential documents pursuant to the Sunshine Act. (App. 4). Goodyear sought a determination pursuant to subsection (5) of the Act that the documents contain trade secrets not pertinent to the tire in question and pursuant to subsection (7) that the documents were not necessary or useful to the public. (App. 3, 5-6). Goodyear also sought a hearing on the constitutionality of the Act. (App. 3). The trial court ruled it lacked jurisdiction to hold the requested hearings. (App. 3).

On appeal, the Third District affirmed. (App. 13). In doing so, the Court looked back to events preceding the first appeal, and decided that the original trial

¹ References to the District Court’s opinion, attached as an Appendix, are to “App. _____.”

judge erred by issuing a blanket confidentiality order requested by Goodyear.² (App. 7). The trial judge had ruled that a pre-trial determination as to whether the tire in question was a “public hazard” under the Sunshine Act was “premature” (App. 3), and that Sunshine Act issues should be deferred until after trial. (App. 7). The Third District held that by asking the trial judge to defer consideration of Sunshine Act issues until after trial, Goodyear “invited error” and waived the right to ever have any hearings on any Sunshine Act issues. (App. 7).

The Third District declined to consider Goodyear’s argument that the Act was unconstitutional as applied to deprive it of its confidential documents without a hearing and in-camera inspection to determine if the trade secret documents pertained to the tire in question and whether the documents were useful or necessary to the public. *See* §69.081(5) and (7). (App. 9). The court held that the doctrine of “law of the case” precluded consideration of those issues because in the original appeal it had rejected Goodyear’s argument that prior to finding the tire was a public hazard, there should be an evidentiary hearing. (App. 9).

² As explained by the Third District, Goodyear’s position was that a “blanket confidentiality order” is a “common and expeditious practice” which allows a trial court to enter an order protecting documents designated as confidential from disclosure to persons outside the litigation. (App. 8). The opposing party may challenge the designation. (App. 8). *See Chicago Tribune Co. v. Bridgestone/Firestone*, 263 F.3d 1304, 1307 (11th Cir. 2001), *Rice v. U.S.*, 39 Fed. Cl. 747, 750 (1997), and *Manual for Complex Litigation* § 11.432 (4th ed. 2004). (App. 8).

The Third District also rejected Goodyear's challenges to the facial constitutionality of the Sunshine Act. The Court declined to consider Goodyear's argument that the Act is a procedural rule improperly enacted by the legislature, because "even if correct" it "would not constitute fundamental error," and could not be raised for the first time on appeal. (App. 11). The Third District considered and rejected Goodyear's argument that the Act is arbitrary, unreasonable and not rationally related to a reasonable government objective (App. 11-12), and held the Act is "constitutional on its face." (App. 13).

SUMMARY OF ARGUMENT

This Court has discretionary jurisdiction to review the Third District's decision that the Sunshine in Litigation Act is constitutional on its face pursuant to Art. V, § 3(b)(3), Fla. Const., which permits review of decisions of district courts of appeal that expressly declare valid a state statute.

This Court has discretionary jurisdiction to review the Third District's application of the "invited error" doctrine which expressly and directly conflicts with a decision of this Court. The doctrine of "invited error" applies to an appellant who obtains a ruling from a trial court and then on appeal switches positions and claims the ruling was error. Here, on the other hand, Goodyear never switched positions and instead claimed on appeal that the trial court's entry of a confidentiality order in its favor was entirely correct.

The Third District's decision that the trial court erred in deferring until after trial consideration of Sunshine Act issues expressly and directly conflicts with a decision of the Second District, holding that hearings on Sunshine Act issues that had been continued were required to be heard after trial.

The Third District's decision expressly and directly conflicts with a decision of this Court on the doctrine of "law of the case" because the Third District applied the doctrine to an issue that was never addressed in a prior appeal.

The Third District's decision expressly and directly conflicts with cases holding that application of a facially unconstitutional statute is fundamental error. In this case the Third District held instead even if a statute is unconstitutional on its face, its application is not necessarily fundamental error.

ARGUMENT

1. Discretionary Jurisdiction Exists Because the Third District's Decision Expressly Declared Valid the Sunshine in Litigation Act.

This Court has discretionary jurisdiction to review decisions of courts of appeal that expressly declare valid a state statute. *See* Art. V, § 3(b)(3) Fla. Const. Discretionary jurisdiction exists here because the Third District expressly declared the Sunshine in Litigation Act to be constitutional.

This issue should be reviewed because the Act has potential application in every products liability action where a manufacturer's confidential, proprietary and trade secret documents are produced.

2. Discretionary Jurisdiction Exists Because the Third District’s Opinion On “Invited Error” Conflicts with a Decision of This Court.

In *Gupton v. Village Key & Saw Shop, Inc.*, 656 So.2d 475 (Fla. 1995), this Court held that pursuant to the invited error rule, “*a party cannot successfully complain about* an error for which he or she is responsible or of rulings that he or she has invited the trial court to make.” *Id.* at 478 (emphasis supplied). The doctrine does not apply where the appellant “has not changed its position and is not arguing for reversal based on an error that it invited or induced.” *Id.*

The Third District clearly misapplied *Gupton* and accordingly discretionary review is appropriate. *See, e.g. Robertson v. State*, 829 So. 2d 901, 904 (Fla. 2002) (conflict jurisdiction exists where district court misapplies supreme court precedent). Based on *Gupton*, there are two requirements for application of the invited error doctrine: (1) a party must invite the trial court to make an erroneous ruling and (2) the party must then change its position on appeal and argue for reversal based on the error it invited. Here, the Third District completely eliminated the second aspect of the invited error rule.

In this case, Goodyear received a blanket confidentiality order from the trial court and the trial court deferred consideration of Sunshine Act issues until after trial. On appeal, Goodyear never changed its position. Goodyear has always contended that the entry of the blanket confidentiality order, and deferral of

Sunshine Act issues, was *correct*. Since Goodyear did not invite a ruling it later claimed to be *error*, the doctrine of invited error does not apply.

The court's decision should be reviewed because by eliminating the requirement that a party change positions and claim a ruling it invited is error, the Third District has eliminated the rationale for finding a waiver. This new "invited error" rule is punitive in nature because it punishes a party for asserting a position if the Third District disagrees with it. Under the Third District's invited error doctrine, any losing appellee could be "punished" and forfeit a valuable right for leading a trial court into a ruling the district court perceives is error. This is irreconcilable with *Gupton*, where this Court stated that the invited error doctrine does not apply if the appellant "has not changed its position and is not arguing for reversal based on an error that it invited or induced." 656 So. 2d at 478.

3. The Third District's Decision Conflicts with a Decision of the Second District Requiring a Post-Trial Hearing on Deferred Sunshine Act Issues.

The Third District's decision expressly and directly conflicts with the decision of the Second District in *E.I. DuPont De Nemours & Co. v. Lambert*, 654 So. 2d 226 (Fla. 2d DCA 1995). The Third District ruled that the trial court erred in entering a blanket confidentiality order and "deferring until after trial" issues related to the Sunshine Act. (App. 7). Accordingly, the Third District held that Goodyear "waived" the right to have a hearing on any Sunshine Act issues. This

conflicts with the *Lambert* court's holding that due process required that deferred Sunshine Act issues must be heard post-trial.

In *Lambert*, the trial court entered a confidentiality order and third parties moved to set it aside pursuant to the Sunshine Act. A trial on the Sunshine Act issues was postponed a number of times and the products liability case went to trial before any Sunshine Act issues were determined. After a verdict against DuPont, the trial court vacated the confidentiality order without affording DuPont a hearing on Sunshine Act issues. The Second District reversed, holding that DuPont's due process rights were violated because it was not afforded notice and an opportunity to be heard on Sunshine Act issues. The Third District's decision that Goodyear waived its right to a hearing on Sunshine Act issues by asking the trial judge to defer a hearing until after trial expressly and directly conflicts with the Second District's decision in *Lambert*.

Review should be granted because the Third District's decision would require an immediate "liability" trial on the issue of public hazard in every case where the Sunshine Act is raised, even if this occurred well in advance of a products liability trial and long before important discovery was completed. It also would require an immediate review by the trial judge of voluminous documents to determine if they were trade secrets that did not pertain to the alleged public hazard or if the documents were useful to the public. The document review would be a

complete waste of judicial resources if it was ultimately determined that the product in question was not a public hazard.

4. The Decision Conflicts with a Decision of this Court on the Doctrine of “Law of the Case.”

“The doctrine of law of the case requires that questions of law actually decided on appeal must govern the case in the same court and the trial court, through all subsequent stages of the proceedings.” *Florida Dep’t of Transp. v. Juliano*, 801 So. 2d 101 (Fla. 2001). The Third District applied the law of the case doctrine to an issue that was never decided on the first appeal in this case. The Third District said: “In the original appeal of this case, Goodyear argued in its answer brief that vacating the confidentiality order without holding an *evidentiary hearing* would violate its due process rights. By finding that the tire was a *public hazard* and instructing that the confidentiality order be vacated, this court in a previous appeal rejected this argument.” (App. 9) (emphasis supplied).

The issue on the second appeal was *not*, however, whether Goodyear was entitled to an evidentiary hearing on the issue of public hazard. Instead, as the Third District described it, in the second appeal: “Goodyear argues that it was denied due process because a hearing and an in-camera inspection were never conducted pursuant to subsections (5) and (7) of the Act to determine whether the documents covered by the protective order contain trade secrets not pertinent to the tire deemed to be a public hazard, or whether disclosure of the documents is

necessary or useful to the public.” (App. 5-6). Obviously, the issue raised in the second appeal was *not* resolved by the first appeal.

The Third District ignored *Juliano*, in which this Court held that the doctrine of law of the case “has no applicability to, and is not decisive of, points presented upon a second writ of error that were not presented upon a former writ of error and consequently were not before the appellate court for adjudication.” *Id.* at 106.

5. The Decision Conflicts with Decisions of this Court and the Fifth DCA Holding that Application of a Facially Unconstitutional Statute is Fundamental Error.

The Third District’s decision expressly and directly conflicts with cases holding that application of a facially unconstitutional statute is fundamental error that can be considered for the first time on appeal. *See Westerheide v. State*, 831 So. 2d 93, 105 (Fla. 2002); *Trushin v. State*, 425 So. 2d 1126, 1129 (Fla. 1982); *B.C. v. Dep’t of Children and Families*, 864 So. 2d 486, 491 (Fla. 5 DCA 2004). The Third District refused to consider Goodyear’s argument that the Sunshine Act is unconstitutional on its face because it is a procedural rule improperly enacted by the legislature. The court held the argument could not be considered for the first time on appeal because the argument “even if correct, would not constitute fundamental error, and thus is not subject to appellate review.” (App. 11). In *Westerheide*, 831 So. 2d at 105, this Court held that “a facial challenge to a statute’s constitutional validity may be raised for the first time on appeal.” As this

Court recognized in *Trushin*, application of a facially invalid statute constitutes “fundamental error.” *Id.* at 1129; *see also B.C*, 864 So. 2d at 491 (“application of an unconstitutional statute constitutes fundamental error”). The Third District’s decision conflicts with these authorities and review should be granted to clarify the important issue of whether application of a facially unconstitutional statute constitutes fundamental error.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests this Court to grant review of the Third District’s decision.

Respectfully submitted,

THORNTON, DAVIS & FEIN, P.A.
Attorneys for Appellant, Goodyear Tire &
Rubber Company
Brickell BayView Centre, Suite 2900
80 S.W. 8th Street
Miami, Florida 33130
Tel: (305) 446-2646
Fax: (305) 441-2374

By: _____
KATHLEEN M. O’CONNOR
Florida Bar No. 333761
FREDERICK J. FEIN
Florida Bar No. 813699

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of Appellant's Initial Brief was furnished by U.S. mail on April 11, 2005, to: **LAURI WALDMAN ROSS, ESQ.**, Lauri Waldman Ross, P.A., 9130 S Dadeland Boulevard, Suite 1612, Miami Florida 33156-7851; **PHILLIP A. HUBBART, ESQ.**, Wetherington, Klein & Hubbard, One Biscayne Tower, Suite 2930, Two South Biscayne Boulevard, Miami, Florida 33131; **BRUCE R. KASTER, ESQ.**, Bruce R. Kaster, P.A., P.O. Box 100, Ocala, Florida 34470-0100; and **GLEN R. GOLDSMITH, ESQ.**, Goldsmith & Atlas, P.A., 9130 South Dadeland Boulevard, Suite 1506, Miami, Florida 33156.

THORNTON, DAVIS & FEIN, P.A.

By: _____
KATHLEEN M. O'CONNOR
Florida Bar No. 333761

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief is printed in Times New Roman 14-point font and is in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

THORNTON, DAVIS & FEIN, P.A.

By: _____
KATHLEEN M. O'CONNOR
Florida Bar No. 333761