No. 3D23-1975

District Court of Appeal of Florida Third District

THE FIRST BAPTIST CHURCH OF GREATER MIAMI,
Appellant

-versus-

MIAMI BAPTIST ASSOCIATION, INC.,
Appellees

REPLY BRIEF

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INTRODUCTION

The question is straightforward: Whether the trial court may dismiss an action with prejudice when counsel asserts a privilege objection to interrogatories following an order that required an "answer"? The answer is no. Such conduct does not rise to the level of willful and deliberate behavior required to justify dismissal. This conclusion is reinforced by the fact that the Church's counsel relied on well-settled law permitting the assertion of privilege—an argument that remains unrebutted on appeal. The trial court's decision to impose dismissal as a sanction constitutes legal error.

Furthermore, the trial court misapplied the *Kozel* factors by conflating the actions of the Church's counsel with those of the client, violating this Court's mandate that the focus remain on the attorney's conduct. By failing to distinguish between the attorney's invocation of privilege and the client's alleged misconduct, the trial court erred in its analysis. Accordingly, this Court should reverse the trial court's order imposing the ultimate sanction of dismissal.

ARGUMENT

I. The appropriate standard of review for determining whether a party has violated an unclear order is de novo.

Ordinarily, a dismissal of an action based on a discovery violation is reviewed for abuse of discretion. *Celebrity Cruises, Inc. v. Fernandes*, 149 So. 3d 744, 751 (Fla 3d DCA 2014) . However, where the trial court bases the sanction "upon noncompliance with something an order does not say, 'the standard of review is legal error, not abuse of discretion'." *Cancino v. Cancino*, 273 So. 3d 122, 126 (Fla. 3d DCA 2019) (internal citations omitted).

The trial court's order granting ultimate sanction should be reviewed under the *de novo* standard because the trial court's dismissal order was predicated on the Church's failure to comply with what the order did not say. R.2725 ("The objection served by Greater Miami was a direct violation of this Court's Order dated July 20, 2023. The evidence that Greater Miami could not merely object to interrogatories but, instead, was required to "answer" them is overwhelming.... Nevertheless, when the deadline came, instead of answering the interrogatories, Greater Miami served objections."). The lynchpin finding of willfulness— which is also the dispositive issue on appeal—was based on what the order does not say (i.e., that

objections were prohibited and privileges were waived). *See Lynne v. Landsman*, 306 So. 3d 390, 392 (Fla. 1st DCA 2020) (holding that the standard of review is *de novo* where a party is held in noncompliance with something an order does not say in an indirect civil contempt case).

II. Asserting privilege as an "answer" to interrogatories cannot, as a matter of law, be deemed willful or deliberate noncompliance with an unclear order.

The trial court committed legal error in imposing the ultimate sanction. The order's ambiguity prevents a finding of willful disregard because vague language in discovery orders cannot justify sanctions for non-compliance. Moreover, the assertion of a privilege, supported by case law, constitutes a valid legal answer rather than non-compliance.

First, as a matter of law, there could be no finding of willful and deliberate disregard for the Court's order because the order was unclear. "[W]hen a final judgment or order is not sufficiently explicit or precise to put the party on notice of what the party may or may not do, it cannot support a conclusion that the party willfully or wantonly violated that order." *Dep't of Health v. Rehab. Ctr. at Hollywood Hills, LLC*, 259 So. 3d 979, 982 (Fla. 4th DCA 2018); *Ross*

Dress for Less Va., Inc. v. Castro, 134 So. 3d 511, 523 (Fla. 3d DCA 2014) ("It is well established that a party cannot be sanctioned for contempt for violating a court directive or order which is not clear and definite as to how a party is to comply with the court's command.").

The order required the Church to provide an answer by a specific date but did not expressly preclude objections or the assertion of privilege. R.2909. Notably, the Association acknowledged that the Church's counsel, who was dealing with the impending death of a loved one, was not involved in drafting the extension order. R.2972-73.[1] On the agreed-upon date, the Church answered the interrogatories.

In a conclusory manner, the Association asserts that "there was nothing unclear about the order." Appellee's Br. 50. To support this claim, the Association relies on extrinsic evidence, specifically

[1] R.2972:25-2973:10 ("So I agreed to an order, and this is what I did for the red line for that, and you'll see ·very clearly, this is my red lines what they proposed, we struck out 'respond' and we put in "answer" because I spoke to the attorney.·It·wasn't Mr. Pierre, and I don't want to cast any aspersions against Mr. Pierre.· It was one of his·colleagues at his firm, and it was a young lady,·and she agreed with me that it wouldn't just be objections. It would be an answer.· So I changed this and sent it to her.").

referencing an email[2] and telephone call that purportedly clarifies the term "answer." R.3032, AAB. 128. The Association's argument fails for a fundamental reason: its reliance on external clarification underscores the order's inherent ambiguity.[3] If the meaning of the term "answer" requires explanation beyond the plain language of the order, the order itself cannot be deemed sufficiently clear to support a finding of willful non-compliance.

In any event, there is no evidence in the record that the Association (or its counsel) shared counsel's interpretation with the trial court before entry of the discovery order at issue. Nor would that be dispositive. The Association's counsel apparently desired that there would be no objections and purportedly edited the agreed order to accomplish that goal. But Florida precedent recognizes that even where objections are waived, privileges are not. *Newman v. Hirst*, 236

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[2] This email states: "Attached are our redline revisions to the order. We are ok with this being submitted for entry as revised." AAB. 128.

[3] As an analogy, courts often rely on extrinsic evidence to interpret ambiguous terms in contracts. *See Gorman v. Kelly*, 658 So. 2d 1049, 1052 (Fla. 4th DCA 1995) ("Where a term in a contract is ambiguous or unclear, "the court may consider extrinsic matters not to vary the terms of the contract, but to explain, clarify or elucidate the ambiguous language with reference to the subject matter of the contract, the circumstances surrounding its making, and the relation of the parties.").

So. 3d 506 (Fla. 5th DCA 2018). And, here, the trial court dismissed the action with prejudice for asserting privileges.

The Association does not refute that *Kilstein v. Enclave Resort, Inc.*, 715 So. 2d 1165 (Fla. 5th DCA 1998), supports the conclusion that the order in this case was unclear. In *Kilstein*, a broadly worded directive requiring "full and complete answers" and to "fully comply" with production requests was deemed too vague to justify imposing the ultimate sanction, particularly when the party partially complied. *Id.* at 1168-69. Similarly, the order here, which merely required an "answer" to interrogatories, is overly broad and subject to interpretation, and asserting privilege as an "answer" does not constitute willful non-compliance, rendering sanctions unwarranted.

Second, the assertion of a privilege in response to interrogatories constitutes a valid "answer" rather than non-compliance.

The Church cites case law, unchallenged by the Association, to establish that asserting privilege is a valid answer. In *Austin v. Barnett Bank of South Florida, N.A.*, 472 So. 2d 830, 830 (Fla. 4th DCA 1985), the Fourth District held that the term "objectionable" in rule 1.380(d) applies only to items within the scope of discovery,

excluding privileged materials. The Association attempts to counter *Austin* by asserting it "does not stand alone" and references *American Funding, Ltd. v. Hill*, 402 So. 2d 1369, 1370 (Fla. 1st DCA 1981.)[4] Appellee Br. 35.

The Association's acknowledgment that Church counsel relied on established precedent demonstrates there was no deliberate disregard for the court's authority, as counsel was entitled to assert the privilege under established law. A mere difference in judicial interpretation does not negate counsel's reliance on valid case law, which clearly supports the principle that asserting privilege is not equivalent to raising an objection.

The Association does not dispute the case law establishing that an agreement to "answer" does not constitute an "express waiver of all privileges" under *Newman*, 236 So. 3d 506 . While the Association contends that *Newman* is of limited utility due to insufficient factual details (Appellee Br. 43), the case's black-letter law reinforces the Church's position that asserting privilege constitutes a valid answer.

[4] The court in *American Funding* acknowledged that a failure to timely object does not "…bar a party from asserting a privilege or exemption for matters outside the scope of permissible discovery." *Id.* at 1371.

Therefore, the Church's counsel's assertion of privilege cannot be construed as willful disregard for the court's authority.

Finally, the Association's reliance on *Bainter v. League of Women Voters of Florida*, 150 So. 3d 1115 (Fla. 2014), is misplaced. *Bainter* focused on the waiver of a First Amendment privilege in a redistricting case, addressing whether procedural missteps, such as untimely assertion, resulted in waiver. *Id.* at 1117. In that case, the responding party did not waive privilege objections in response to a document production or during deposition testimony. *Id.* The responding party only objected after six months of hearing and after he was held in contempt for failing to respond to discovery demands. *Id.* In contrast, in the present case, the Church's counsel timely asserted the privilege in the initial response to interrogatories. *Bainter* does not provide any guidance on whether the assertion constituted willful disregard. *Id.* at 1115-34.

Thus, the assertion of privilege was consistent with applicable law and cannot be construed as a willful disregard of the trial court's order.

III. The trial court misapplied the *Kozel* factors by improperly conflating the attorney's conduct with that of the client, in direct violation of this Court's mandate.

The trial court's order imposing the ultimate sanction must be reversed because it misapplied the *Kozel* factors, failed to comply with this Court's mandate to distinguish the conduct of the Church from that of its counsel in its application, and is unsupported by evidence under a proper application of the *Kozel* factors.

In *First Baptist Church of Greater Miami v. Miami Baptist Association*, this Court emphasized the importance of distinguishing between the conduct of a client and that of counsel when considering dismissal of a lawsuit due to discovery misconduct, requiring specific findings for each. 373 So. 3d 1194, 1197 (Fla. 3d DCA 2023). The trial court was bound by this mandate and lacked discretion to deviate from it. *See Mendelson v. Mendelson*, 341 So. 2d 811, 813-14 (Fla. 2d DCA 1977) ("No principle of appellate jurisdiction is more firmly established than the one which provides that a trial court utterly lacks the power to deviate from the terms of an appellate mandate.").

The trial court failed to comply with this directive. The uncontroverted evidence establishes that it was the Church's

counsel—not the Church itself—who asserted the privilege. R.2948-50, 3049. Yet the trial court's order improperly evaluated the Church's conduct under the *Kozel* factors. R.2725-32. This misapplication constitutes reversible error. *See Ledo v. Seavie Resources, LLC*, 149 So. 3d 707, 710 (Fla. 3d DCA 2014) (holding that the *Kozel* factors are inapplicable when sanctions target a party's actions rather than its counsel's).

The trial court erred by misapplying the *Kozel* factors and disregarding the plain language of each factor. That constitutes reversible error as well. *See N.W. Nat. Ins. Co. v. Gen. Elec.*, 362 So. 2d 120, 123 (Fla. 3d DCA 1978) ("Though findings arrive at this court with a presumption of correctness, it is the duty of an appellate court to reverse where a decision is based upon a finding that represents a misapplication of the law governing the facts disclosed.").

Finally, under the proper application of *Kozel*, the trial court's order granting the ultimate sanction should be reversed because the evidence does not support such a finding.

Willfulness[5]

[5] Below, and on appeal, the Association's counsel has stated to the judiciary that the Church's counsel misrepresented to the trial court as relates to the production of financial records. The Association's counsel is wrong. The financial records requested by the Association

Under the first *Kozel* factor, a trial court must determine whether the attorney's conduct was willful, deliberate, or contumacious, rather than an act of neglect. *Kozel v. Ostendorf*, 629 So. 2d 817, 818 (Fla. 1993). As the Florida Supreme Court explained, the trial court must make a specific "*finding that the conduct upon which the order is based* was equivalent to willfulness or deliberate disregard." *Ham v. Dunmire*, 891 So. 2d 492, 496 (Fla. 2004) (emphasis added).

Here, the trial court erred by attributing willful misconduct to the Church rather than focusing on the actions of its counsel, as required by this Court's mandate. The trial court's order explicitly targets the Church's conduct, concluding it directly violated the court's order in a willful and deliberate manner. R.2725. However,

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were bills related to maintaining the upkeep of the property. *See* AAB. 0012 ("All documents showing each and every payment made by you of any expense with respect to the property in dispute for the last five years, including specifically, without limitation, property taxes, utility bills, property insurance, flood insurance, repairs made to the property, remodeling expenses relating to the property, lawn maintenance, etc."). These records are not privileged and are typically sought in property dispute litigation. The Association did not request for a wholesale disclosure of financial records – it asked for *bills*. The Church's counsel informed the trial court that he provided the *bills* in response to the request for production. R.2839-41. To continually suggest that the Church's counsel has misled the judiciary is not only offensive but frankly disingenuous.

the uncontroverted evidence establishes that the assertion of privilege was made by the Church's counsel—not the Church itself. R.2948-50, 3049. This distinction is critical, as the *Kozel* analysis requires evaluating the attorney's actions, not the client's, when determining sanctions.

Additionally, the evidence does not support a finding that the attorney's conduct amounted to willful disregard of the court's authority as a matter of law. The order in question merely extended the response deadline and did not preclude asserting privilege. R.2909. The Church's counsel's assertion of privilege was supported by established case law, which remains unrefuted on appeal. *See Kilstein*; *Newman*; *Austin*. Thus, as a matter of law, the conduct cannot constitute willful non-compliance.

The Association attempts to justify the trial court's finding by pointing to the Church's alleged history of discovery disputes. Appellee's Br. 49-51. However, this argument improperly conflates past unrelated conduct with the present issue and fails to demonstrate willful disregard in this instance. The sanctionable act—the assertion of privilege—was the decision of counsel, not the Church. Without evidence of willful defiance by either the Church or

its counsel, the trial court lacked the basis to impose the ultimate sanction of dismissal.

Prior Sanctions

Under the second *Kozel* factor, the trial court must evaluate whether the attorney had been previously sanctioned. *Kozel,* 629 So. 2d at 818. Here, the trial court erroneously equated the attorney's representation of the Church during a deposition—actions consistent with performing his professional duties—with being sanctioned. R.2729-30. This misinterpretation conflicts with the plain language of the *Kozel* factor, which requires evidence of prior sanctions directly imposed on the attorney. The record establishes that the attorney had not been previously sanctioned. R.1-3089, AAB.1-177. Thus, the trial court erred in finding otherwise. On appeal, the Association fails to rebut this point, as there is no evidence of prior sanctions against the Church's counsel.

Client Involvement

Under the third *Kozel* factor, the trial court must determine whether the client was personally involved in the act of disobedience. *Kozel,* 629 So. 2d at 818. The trial court failed to apply this factor correctly, instead referencing deposition testimony unrelated to the

specific act at issue—the assertion of privilege. The evidence establishes that the privilege assertion was made solely by counsel, without any direct involvement from the Church. R.2948-50, 3049.

Similarly, the Association's argument misinterprets the plain language of this factor, which focuses exclusively on client involvement in the act of disobedience. It improperly relies on findings about the Church's corporate representatives being "obstreperous witnesses" who provided "implausible testimony," but these findings pertain to deposition conduct and bear no relevance to the assertion of privilege. Appellee Br. 54. By conflating these distinct issues, the Association attempts to create an unwarranted link between the Church and the privilege assertion.

Moreover, the Association previously admitted that it lacked evidence to support this *Kozel* factor, undermining its position. R.1186, n.15. Without concrete evidence of the Church's direct involvement in the privilege assertion, the trial court's findings are speculative and unsupported. *See Rose v. Fiedler*, 855 So.2d 122, 127 (Fla. 4th DCA 2003) ("[H]aving found no evidence of client knowledge or involvement *in the attorney misconduct*, we reverse the dismissal and remand so that the trial court may consider appropriate sanctions.").

Prejudice

The fourth *Kozel* factor requires trial courts to determine whether delays in litigation caused by an attorney's actions resulted in prejudice to the opposing party, such as undue expense, lost evidence, or other substantive harm. *Kozel,* 629 So. 2d at 818. In this case, the trial court misapplied this factor by failing to demonstrate a clear connection between the specific conduct at issue—asserting privilege in response to interrogatories—and any concrete prejudice beyond general inconvenience or frustration. Although the court broadly cited delays and increased litigation costs, it did not establish that these stemmed directly from the privilege assertion or resulted in significant harm, such as missed deadlines or loss of critical evidence. *See, e.g.*, *Rodriguez v. Miami-Dade Cnty.*, 117 So. 3d 400, 405 (Fla. 2013) ("[C]ontinuation of litigation and any ensuing costs, time, and effort in defending such litigation does not constitute irreparable harm.").

The trial court's findings primarily emphasized broader litigation conduct, including the Church's "steadfast refusal" to provide discovery. R.2730-31. However, this does not directly address how asserting privilege by counsel caused meaningful prejudice. Asserting privilege is a routine legal process and does not inherently

result in the severe prejudice required for sanctions. The Association's claim that delays stemmed from the Church's refusal to provide "basic discovery information" (Appellee's Br. 55) is similarly flawed, as it fails to demonstrate how the privilege assertion by counsel impeded case merits or trial preparation.

Notably, the discovery in question pertained to the Church's finances. If the failure to provide this information caused actual harm, the trial court could have resolved the issue by overruling the privilege and compelling the Church to respond, thereby curing any potential prejudice. Prejudice under *Kozel* must involve demonstrable, substantive harm, not generalized allegations or the routine costs of litigation disputes. *See Kelley v. Schmidt*, 613 So. 2d 918, 920 (Fla. 1st DCA 1993) ("Moreover, when pressed by the trial judge, appellee's counsel could not represent that any irrevocable prejudice had been incurred as a result of counsel's noncompliance.").

Reasonable Justification

Under the fifth *Kozel* factor, courts must evaluate whether the attorney offered a reasonable justification for noncompliance. *Kozel,* 629 So. 2d at 818. In this case, the trial court misapplied this factor by failing to properly assess the attorney's conduct and by conflating

the Church's alleged failure to pay a monetary sanction with the attorney's justification for asserting privilege in discovery responses. This factor focuses specifically on the attorney's reasoning for his actions, not the client's unrelated failures. The trial court attributed the Church's payment failure—a separate issue unrelated to the attorney's conduct—to the justification analysis. In failing to distinguish between the Church's alleged shortcomings and the attorney's reasonable reliance on legal precedent, the trial court misapplied the fifth *Kozel* factor.

Moreover, the Church's counsel offered a reasonable justification for asserting privilege in response to interrogatories, citing established legal precedent that permits privilege assertions as valid answers. R.3045. The Church's counsel also explained that, at the time the order was drafted, he was dealing with the impending death of a loved one and was unaware of the Association counsel's intended meaning of "answer" in the court's order. R.3044-47, 3050-51. The trial court's order disregarded this legal framework and ignored the inherent ambiguity in its directive, further undermining its findings under the fifth *Kozel* factor.

Judicial Administration

Under the sixth *Kozel* factor, a trial court must evaluate whether an attorney's conduct has caused significant problems for judicial administration, such as delays or inefficiencies directly tied to the attorney's actions. *Kozel,* 629 So. 2d at 818. Here, the trial court conflated the overall litigation history with specific attorney misconduct, failing to draw a direct causal link between the alleged attorney actions—such as asserting privilege—and significant burdens on judicial administration. Instead of focusing on the attorney's conduct as required, the court broadly referenced "multi-year delays" and "multiple hearings" without demonstrating how these issues arose from the attorney's privilege assertion or any specific act of misconduct. This case was never set for trial, and its timeline was largely shaped by appeals that consumed nearly half of its duration. As emphasized in *First Baptist*, 373 So. 3d at 1197, the analysis should target specific actions by counsel.

Lesser Sanctions

The Florida Supreme Court emphasized that dismissal, as a sanction for litigation misconduct, should be a last resort and applied only when no lesser sanction would suffice to remedy the issue. *Kozel*, 629 So. 2d at 818. This Court explicitly advised the trial court, that a "fine, public reprimand, or contempt order may often be the

appropriate sanction to impose on an attorney *in those situations where the attorney and not the client, is responsible for the error*." *The First Baptist Church of Greater Miami v. Miami Baptist Ass'n*, 373 So. 3d 1194, 1197 (Fla. 3d DCA 2023) (emphasis in the original).

The trial court failed to follow this Court's directive, especially when it was clear it was the attorney's conduct not that of the client. Dismissal should only follow when lesser sanctions, such as overruling the privilege assertion and compelling a response to the interrogatories, have proven inadequate. This approach aligns with settled law. *Allington Towers North v. Weisberg*, 439 So. 2d 891, 892 (Fla. 4th DCA 1983) ("We feel that the trial court as a condition precedent to such a dismissal would have to specifically point out the shortcoming in the answers thereby giving the counterclaimant an opportunity to remedy."); *Stoner v. Verkaden*, 493 So. 2d 1126, 1127 (Fla. 4th DCA 1986) (holding that where a party has never been instructed by the court to comply with any discovery request, sanctions for noncompliance are inappropriate). By dismissing the case without exploring these lesser remedies, the trial court disregarded the directives set forth in *Kozel* and by this Court. Accordingly, the trial court erred.

CONCLUSION

In conclusion, The First Baptist Church of Greater Miami requests that this Court reverses the trial court's order.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished via electronic delivery to the below listed parties, on November 25, 2024 to W. Gary Yeldell, Esq., P.O. Box, Keystone Heights, FL 32656, wgy@wclegal.com, Matthew L. Lines, Esq., 3350 Virginia Street, 2nd Floor, Miami, Florida 33133; lines@linelaw.com; Carlos Lerman, 2611 Hollywood Blvd, Hollywood, Fl 33020; carlos@lwlawfla.com, Kertch J Conze, 3600 Red Rd Ste, Miramar, FL 33025-6014; conze@conzelaw.com.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fla. R. App. P. 9.100, I hereby certify that this brief was computer generated using Bookman 14-point font.

s/Faudlin Pierre_____
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