

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-28

Filed: 6 October 2015

Durham County, No. 14 CVD 3144

STEVEN CRAIG HERNDON, Plaintiff,

v.

ALISON KINGREY HERNDON, Defendant.

Appeal by defendant from order entered 10 September 2014 by Judge Doretta L. Walker in Durham County District Court. Heard in the Court of Appeals 19 May 2015.

*Foil Law Offices, by N. Joanne Foil and Laura E. Windley, for plaintiff-appellee.*

*Tharrington Smith, LLP, by Jill Schnabel Jackson and Evan B. Horwitz, for defendant-appellant.*

DIETZ, Judge.

This is an appeal from a domestic violence protective order entered against Alison Herndon upon motion of her husband Steven Herndon. Mr. Herndon alleged that his wife was putting sleep-inducing drugs in his food and then sneaking out at night to conduct an affair, often leaving their children home unsupervised.

When Ms. Herndon's counsel called her to testify at the hearing, the trial court stated, "You're calling her. She ain't going to get up there and plead no Fifth Amendment?" Ms. Herndon's counsel responded that she did not expect Ms. Herndon

HERNDON V. HERNDON

*Opinion of the Court*

to invoke her Fifth Amendment right to remain silent. The trial court then stated, “I want to make sure that wasn’t going to happen because you -- somebody might be going to jail then. I just want to let you know. I’m not doing no Fifth Amendment.”

Ms. Herndon testified on direct examination without invoking her Fifth Amendment rights. The trial court then stated that there would not be any cross-examination. Instead, the trial court asked Ms. Herndon questions, many of which were beyond the scope of Ms. Herndon’s direct examination. In response to those questions, Ms. Herndon stated variations of “I don’t recall” or “I don’t remember.”

After ending the questioning, the trial court explained that it found Ms. Herndon’s testimony “not credible that you don’t remember.” The court then entered a domestic violence protective order against Ms. Herndon.

We are constrained to reverse and remand this case. Under long-standing U.S. Supreme Court precedent, a witness does not automatically waive her Fifth Amendment rights by voluntarily taking the stand to testify in a civil case. Instead, the trial court must listen to the witness’s testimony and determine whether the questions for which the witness invokes the right to remain silent concern “matters raised by her own testimony on direct examination.” *Brown v. United States*, 356 U.S. 148, 156 (1958). If so, then the witness has waived her Fifth Amendment rights as to those questions.

HERNDON V. HERNDON

*Opinion of the Court*

Here, the trial court's statement that "I'm not doing no Fifth Amendment" and that if Ms. Herndon attempted to invoke her Fifth Amendment rights "somebody might be going to jail" violated Ms. Herndon's Fifth Amendment rights. The threat to imprison Ms. Herndon if she invoked her right to remain silent may have forced Ms. Herndon to answer questions differently than she otherwise would have if she felt free to assert that constitutional right. Accordingly, we must vacate and remand this case for a new hearing that disregards Ms. Herndon's previous testimony, obtained in violation of her Fifth Amendment rights.

Finally, as explained below, our need to vacate and remand this case on Fifth Amendment grounds precludes us from reaching the remaining issues raised in this appeal under the doctrine of constitutional avoidance.

**Facts and Procedural Background**

On 21 May 2014, Plaintiff Steven Herndon filed a complaint and motion for a domestic violence protective order against his wife, Defendant Alison Herndon. In his complaint, Plaintiff claimed that Defendant caused or attempted to cause bodily injury to him and the parties' four minor children, and that Mr. Herndon lived in fear of imminent serious bodily injury. Specifically, Mr. Herndon alleged that Ms. Herndon had drugged his food and drink on at least three occasions, causing him to pass out and become ill. Mr. Herndon also alleged that, after rendering him incapacitated, his wife left the couple's four minor children in the home unsupervised

HERNDON V. HERNDON

*Opinion of the Court*

while she visited her lover. Based on these allegations, the trial court entered an *ex parte* domestic violence protective order that same day and scheduled a full hearing.

On 10 September 2014, the trial court held a full hearing. Following Mr. Herndon's evidence, Ms. Herndon's counsel called her to the stand and the following exchange occurred:

COUNSEL: Call Alison Herndon.

THE COURT: All right. Before we do that, let me make a statement. You're calling her. She ain't going to get up there and plead no Fifth Amendment?

COUNSEL: No, she's not.

THE COURT: I want to make sure that wasn't going to happen because you -- somebody might be going to jail then. I just want to let you know. I'm not doing no Fifth Amendment.

After defense counsel's direct examination, the trial court denied Mr. Herndon's counsel the right to cross-examination, explaining that "I was going to let you all ask two questions, but we're about [out] of time for them now." The court then asked Ms. Herndon a series of questions, some of which concerned whether Ms. Herndon had admitted in text messages that she was drugging her husband. Ms. Herndon answered many of those questions with variations of "I don't recall" or "I don't remember."

After these questions concluded, the trial court announced its ruling. The court stated that it did not believe Ms. Herndon's testimony: "I find your limited testimony

you did talk about to be not credible that you don't remember." The court then made a series of additional findings and conclusions and later entered a written domestic violence protective order. Ms. Herndon timely appealed.

### **Analysis**

Among the many arguments presented in this appeal, Ms. Herndon contends that her Fifth Amendment rights were violated when the trial court stated "You're calling her. She ain't going to get up there and plead no Fifth Amendment" and that "I want to make sure that wasn't going to happen because you -- somebody might be going to jail then. I just want to let you know. I'm not doing no Fifth Amendment." We agree that these statements violated Ms. Herndon's Fifth Amendment rights and require us to vacate and remand this matter for a new hearing that disregards Ms. Herndon's previous testimony.

The Fifth Amendment protects an individual from being compelled to testify in a way that could incriminate her or subject her to fines, penalties, or forfeiture. *See State v. Pickens*, 346 N.C. 628, 637, 488 S.E.2d 162, 166 (1997). To determine whether the Fifth Amendment privilege applies, the trial court must evaluate whether, given the implications of the question and the setting in which it was asked, a real danger of self-incrimination by the witness exists. *Id.* at 637, 488 S.E.2d at 167. The court can reject a claim of Fifth Amendment privilege only if there is no possibility of such danger. *Id.* at 637, 488 S.E.2d at 167.

HERNDON V. HERNDON

*Opinion of the Court*

Importantly, the “privilege against self-incrimination is intended to be a shield and not a sword.” *McKillop v. Onslow County*, 139 N.C. App. 53, 63, 532 S.E.2d 594, 601 (2000). As a result, although a witness does not “forego the right to invoke on cross-examination the privilege against self-incrimination” merely by choosing to testify willingly in a civil proceeding, that choice is a waiver of the right with regard to “matters raised by [the witness’s] own testimony on direct examination.” *Brown v. United States*, 356 U.S. 148, 154-56 (1958). Indeed, it is hornbook law that “[a] party to or other witness in a civil proceeding does not waive his privilege merely by taking the stand.” *Testifying in civil proceedings as waiver of privilege against self-incrimination*, 72 A.L.R.2d 830 (2014) (collecting cases). When a witness chooses to testify, “the privilege is not lost as to matters wholly unrelated to and not connected with the subject of the direct examination.” *Id.*

In *Brown*, the Supreme Court held that the decision whether to permit invocation of the Fifth Amendment in a civil proceeding is one that can be made only after the trial court considers what the witness “said on the stand.” *Id.* at 157. In other words, the determination that a witness may not invoke the Fifth Amendment cannot be made simply because the witness “physically took the stand.” *Id.*

That is precisely what happened here. The trial court first sought to confirm with Ms. Herndon’s counsel that, if Ms. Herndon testified, “[s]he ain’t going to get up there and plead no Fifth Amendment.” The court then threatened to imprison Ms.

HERNDON V. HERNDON

*Opinion of the Court*

Herndon (or her counsel) if Ms. Herndon invoked her Fifth Amendment rights during her testimony: “I want to make sure that wasn’t going to happen because you -- somebody might be going to jail then. I just want to let you know. I’m not doing no Fifth Amendment.”

Under *Brown*, the trial court’s statements violated Ms. Herndon’s Fifth Amendment rights. Ms. Herndon was left with the choice of forgoing her right to testify at a hearing where her liberty was threatened or forgoing her constitutional right against self-incrimination. It was error for the trial court to place her in that impossible situation. Moreover, the error was prejudicial and “amounts to the denial of a substantial right.” N.C. R. Civ. P. 61. Although Ms. Herndon’s direct testimony did not address her alleged drugging of her husband, the trial court asked her about text messages that corroborated this allegation. Ms. Herndon responded to these questions with variations of “I don’t recall” and “I don’t remember.” The trial court then relied on those answers to determine that Ms. Herndon’s testimony was not credible. The trial court’s threat to imprison Ms. Herndon if she invoked her Fifth Amendment rights may have forced Ms. Herndon to answer these questions differently than she otherwise would have if she felt free to assert that constitutional right.

The dissent asserts that Ms. Herndon waived her Fifth Amendment rights when her counsel indicated that Ms. Herndon did not plan to invoke those rights. But

HERNDON V. HERNDON

*Opinion of the Court*

Ms. Herndon’s counsel could not have anticipated that the trial court, on its own initiative, would ask Ms. Herndon questions well beyond the scope of the direct testimony. Thus, counsel’s statement that Ms. Herndon would not invoke her Fifth Amendment rights is more reasonably viewed as addressing the scope of her testimony on direct.<sup>1</sup> And, in any event, a trial court cannot demand that a witness waive her Fifth Amendment rights in order to testify in her own defense—particularly in a proceeding like this one, where Ms. Herndon’s fundamental right to be with her children is at stake. *See Jenkins v. Wessel*, 780 So. 2d 1006, 1008 (Fla. Dist. Ct. App. 2001) (discussing the scope of Fifth Amendment waiver for testimony during a domestic violence protective order hearing).

The dissent also cites *McKillop v. Onslow County*, 139 N.C. App. 53, 63, 532 S.E.2d 594, 601 (2000), a case in which this Court found a complete waiver of a party’s Fifth Amendment rights. But *McKillop* involved a plaintiff who *initiated* the legal proceedings by challenging the constitutionality of an ordinance regulating adult businesses. This Court held that “if a plaintiff seeks *affirmative relief* or a defendant pleads *an affirmative defense*[,] he should not have it within his power to silence his own adverse testimony when such testimony is relevant to the cause of action or the defense.” *Id.* (emphasis added). Here, by contrast, Ms. Herndon is defending an action brought against her, seeking a protective order that would prevent her from

---

<sup>1</sup> Notably, in his Appellee Brief, Mr. Herndon does not contend that this statement constituted a waiver.



HERNDON V. HERNDON

*Opinion of the Court*

contacting her own children. As the Florida District Court of Appeal acknowledged in *Jenkins*, a defendant in this circumstance is entitled to invoke the Fifth Amendment in response to questions beyond the scope of her direct testimony. *See* 780 So. 2d at 1008.

Finally, the dissent notes that Ms. Herndon “presents no substantive authority in support of her argument.” To be sure, there are few citations to legal authority in this section of Ms. Herndon’s brief, but Ms. Herndon quoted the portion of the hearing transcript containing the trial court’s challenged statements, asserted a violation of the Fifth Amendment, and cited both the Fifth Amendment to the U.S. Constitution and a U.S. Supreme Court case discussing the scope of Fifth Amendment rights. We believe that is sufficient to satisfy Rule 28(b)(6) of the Rules of Appellate Procedure. Indeed, Mr. Herndon had no difficulty understanding and responding to this argument; his Appellee Brief cites and discusses both *Brown* and *McKillop*.

In sum, we hold that the trial court violated Ms. Herndon’s Fifth Amendment rights. We therefore vacate and remand this case for a new hearing. At that hearing, the trial court should disregard Ms. Herndon’s testimony from the previous hearing. If Ms. Herndon chooses to testify at the new hearing, the trial court should assess

HERNDON V. HERNDON

*Opinion of the Court*

any invocation of the Fifth Amendment under the test established by the Supreme Court in *Brown*.<sup>2</sup>

This appeal also raises several other evidentiary issues, one of which involves an issue of first impression with a constitutional dimension concerning the right to privacy in the marital relationship. We cannot address those issues. As explained above, we must vacate and remand this case for a new hearing. At that hearing, the trial court may not rule the same way on these evidentiary issues, or the parties may choose to present different evidence and these issues might never arise. Thus, our discussion of those issues in this opinion would be non-binding dicta, *see Trustees of Rowan Tech. College v. J. Hyatt Hammond Associates, Inc.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985), or, worse yet, might be an impermissible advisory opinion, *Kirkman v. Wilson*, 328 N.C. 309, 312, 401 S.E.2d 359, 361 (1991). Moreover, with respect to the issue concerning the right to privacy, addressing it would violate the long-standing principle that “the courts of this State will avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds.” *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002).

---

<sup>2</sup> We note that Ms. Herndon’s invocation of her Fifth Amendment rights in response to certain questions by the court, or counsel on cross-examination, will not impede the court’s ability to find the truth in a civil hearing. “The finder of fact in a civil cause may use a witness’ invocation of his Fifth Amendment privilege against self-incrimination to infer that his truthful testimony would have been unfavorable to him.” *McKillop*, 139 N.C. App. at 63-64, 532 S.E.2d at 601. Thus, if Ms. Herndon refuses to answer certain questions based on her Fifth Amendment rights, the trial court may draw an adverse inference supporting Mr. Herndon’s request for the protective order.

HERNDON V. HERNDON

*Opinion of the Court*

Accordingly, for the reasons discussed above, we vacate and remand this case based on the violation of Ms. Herndon's Fifth Amendment rights, and decline to reach the remaining issues raised on appeal.

**Conclusion**

For the reasons stated above, we vacate and remand the trial court's entry of the domestic violence protective order and remand this matter for further proceedings.

VACATED AND REMANDED.

Judge STEPHENS concurs.

Judge BRYANT dissents by separate opinion.

BRYANT, Judge, dissenting.

The majority reverses and remands on grounds that the trial court violated defendant's Fifth Amendment rights. However, under the circumstances present in this case, where defendant waived her Fifth Amendment privilege, then took the stand and testified in her own defense, the trial court's assertion that defendant would not be allowed to claim the privilege has no practical and certainly no prejudicial effect. Because there was no violation of defendant's Fifth Amendment rights, I respectfully dissent.

“No person . . . shall be compelled in any criminal case to be a witness against himself.” U.S. Const. amend. V. This phrase, commonly known as the privilege against self-incrimination, is meant to assure individuals that they will not be compelled to give testimony which will tend to incriminate them or which will tend to subject them to fines, penalties, or forfeiture. *McKillop v. Onslow Cnty.*, 139 N.C. App. 53, 62–63, 532 S.E.2d 594, 600 (2000). “However, ‘it is well established that the privilege protects against real dangers, *not remote and speculative possibilities*,’ and a witness may not arbitrarily refuse to testify without existence in fact of a real danger, it being for the court to determine whether that real danger exists.” *Trust Co. v. Grainger*, 42 N.C. App. 337, 339, 256 S.E.2d 500, 502 (1979) (emphasis added) (quoting *Zicarelli v. Investigation Comm’n*, 406 U.S. 472, 478, 32 L. Ed. 2d 234, 240 (1972)).

HERNDON V HERNDON

*BRYANT, J., dissenting*

At the outset, it should be noted that defendant has failed to argue any case law in support of her argument, citing only to *Malloy v. Hogan*, 378 U.S. 1, 12 L. Ed. 2d 653 (1964), for the proposition that the Fifth Amendment right against compulsory self-incrimination is applicable to the states through the Fourteenth Amendment. As defendant presents no substantive authority in support of her argument, our Rules of Appellate Procedure normally require that defendant's argument be dismissed. See N.C. R. App. P. 28(b)(6) (2015) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."). However, the majority chooses to address the Fifth Amendment issue as its sole reason for reversing the trial court; I therefore address the issue in dissent.

Here, a review of the record fails to demonstrate a violation of defendant's constitutional right against self-incrimination. The transcript of the hearing indicates that defendant and her paramour were both hostile witnesses. Defendant's paramour was called as a witness by plaintiff. On direct examination, defendant's paramour consistently refused to answer questions posed by plaintiff. Instead, he repeatedly asserted his Fifth Amendment right against compulsory self-incrimination in lieu of answering the questions posed.<sup>3</sup> With the exception of questions regarding communications between defendant and her paramour regarding

---

<sup>3</sup> According to the record, plaintiff attempted to depose defendant's paramour prior to trial, but defendant's paramour refused to testify under oath or remain for the deposition. Later, Judge David Q. LeBarre found defendant's paramour to be willfully not in compliance with a subpoena of the Durham County District Court.

defendant's children (which the court found did not expose defendant's paramour to criminal culpability), there is nothing in the record to indicate that the paramour was compelled to answer questions once he asserted his Fifth Amendment right.

THE COURT: I understand why you are not answering the other questions and nobody is asking you to . . . .

In fact, following its order compelling testimony regarding communications about defendant's children, the trial court informed the witness that the scope of her order compelling his testimony was limited to the testimony about those communications.

After plaintiff rested his case, defendant put on her direct case. Defendant called a neighbor of plaintiff and defendant as a witness, whose testimony on direct and cross-examination was in response to many questions regarding plaintiff and defendant, their children, and many aspects of the parties' lives. Defense counsel then called defendant as a witness. As defendant was about to take the stand on her own behalf, the following occurred:

THE COURT: Thank you. Come on down. Call your next witness.

[Defense counsel]: Call Alison Herndon.

THE COURT: All right. Before we do that, let me make a statement. *You're calling her. She ain't going to get up there and plead no Fifth Amendment?*

*[Defense counsel]: No, she's not.*

THE COURT: I want to make sure that wasn't going to happen because you -- somebody might be going to jail

then. I just want to let you know. I'm not doing no Fifth Amendment.

[Defense counsel]: No.

THE COURT: Okay. Call your witness.

[Defense counsel]: Alison Herndon.

(emphasis added). The majority holds that this statement by the trial court constituted a violation of defendant's constitutional right against self-incrimination, because "[this] threat to [defendant] . . . may have forced [her] to answer questions *differently* than she otherwise would have if she felt free to assert that constitutional right." (emphasis added). I strongly disagree with the majority's holding and its reasoning.

To the trial court's question, "You're calling her. She ain't going to get up there and plead no Fifth Amendment?" defendant's counsel responded, "No she's not." Defendant's counsel made no further response or objection to the trial court's statement. Defendant testified at length regarding matters before the court, and never asserted or attempted to assert a Fifth Amendment privilege, nor did defendant make a proffer that her testimony was in anyway compromised, that she felt threatened or forced to answer questions differently based on the trial court's comments. As such, the factual basis upon which the majority bases its opinion, is unsupported. There is nothing in the record or transcript to permit the majority's finding that defendant's Fifth Amendment right against self-incrimination was

violated. In fact, counsel's response that defendant would not plead the Fifth, could, I submit, be considered a waiver of the privilege. Further, it is clear that defendant could have refused to testify upon hearing the trial court's additional statement that "somebody might be going to jail"; instead, defendant proceeded to testify.

[W]hen a witness voluntarily testifies, the privilege against self-incrimination is amply respected without need of accepting testimony freed from the antiseptic test of the adversary process. The witness himself, certainly if he is a party, determines the area of disclosure and therefore of inquiry. *Such a witness has the choice, after weighing the advantage of the privilege against self-incrimination against the advantage of putting forward his version of the facts and his reliability as a witness, not to testify at all.* He cannot reasonably claim that the Fifth Amendment gives him not only this choice but, if he elects to testify, an immunity from cross-examination on the matters he has himself put in dispute. It would make of the Fifth Amendment not only a humane safeguard against judicially coerced self-disclosure but a positive invitation to mutilate the truth a party offers to tell.

*Brown v. United States*, 356 U.S. 148, 155–56, 2 L. Ed. 2d 589, 597 (1958) (emphasis added). While the majority cites *Brown* in support of its holding that a Fifth Amendment violation occurred, I do not read *Brown* as supporting the overly technical application made by the majority. The majority states that *Brown* holds "the decision whether to permit invocation of the Fifth Amendment in a civil proceeding is one that can be made only after the trial court considers what the witness 'said on the stand.'" And a "determination that a witness may not invoke the Fifth Amendment cannot be made simply because the witness 'physically took the



stand.’ ” Viewing the facts as interpreted by the majority, even if the trial court’s actions did not follow the procedure the majority seems to think is required before a ruling on privilege, I am unaware of any cases that would consider these facts to constitute a Fifth Amendment violation and support a reversal of this case.

I disagree with the majority’s assertion that *Brown* is an indication of “long-standing U.S. Supreme Court precedent” that “a witness does not waive her Fifth Amendment rights by voluntarily taking the stand to testify in a civil case.” *Brown* resulted from a civil contempt proceeding during which the defendant was held in contempt for failure to answer certain questions on cross-examination. The United States Supreme Court held that where the defendant took the stand voluntarily and testified on her own behalf, she could **not** invoke the privilege against self-incrimination as to relevant matters, and affirmed the lower court’s contempt ruling. *See McKillop*, 139 N.C. App. at 64–65, 532 S.E.2d at 601 (“[U]nder [*Cantwell v. Cantwell*, 109 N.C. App. 395, 427 S.E.2d 129 (1993)], we hold that [the] plaintiff must choose between her right not to incriminate herself in a pending criminal trial and her claim that she cannot be held in civil contempt.”).

In *McKillop*, this Court addressed *Brown* and discussed how, even when a party invokes the Fifth Amendment, the trial court has a duty to weigh the rights of the litigants and ensure that there is due process and a fair trial:

While we recognize that the defendant in the present case had the right to invoke her privilege

against self-incrimination, "the interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege . . . ." *Brown v. United States*, 356 U.S. 148, 156, 2 L. Ed. 2d 589, 597, *reh'g denied*, 356 U.S. 948, 2 L. Ed. 2d 822 (1958) (a party witness in a criminal case cannot present testimony on direct examination and then invoke the privilege on cross-examination); *see also Pulawski v. Pulawski*, 463 A.2d 151, 157 (R.I. 1983) (as between private litigants, the privilege against self-incrimination must be weighed against the right of the other party to due process and a fair trial). The privilege against self-incrimination is intended to be a shield and not a sword. *Pulawski*, 463 A.2d at 157; *Christenson v. Christenson*, 162 N.W.2d 194, 200 (Minn. 1968). Therefore, "if a plaintiff seeks affirmative relief or a defendant pleads an affirmative defense[,] he should not have it within his power to silence his own adverse testimony when such testimony is relevant to the cause of action or the defense." *Christenson*, 162 N.W.2d at 200 (citation omitted).

[*Cantwell*, 109 N.C. App. at 397, 427 S.E.2d at 130–31]. Finding *Christenson* persuasive and instructive, this Court held "a party has a right to seek affirmative relief in the courts, but if in the course of her action she is faced with the prospect of answering questions which might tend to incriminate her, she must either answer those questions or abandon her claim." *Id.* at 398, 427 S.E.2d at 131.

Furthermore, it is well established that North Carolina law allows the trier of fact to infer guilt on a civil defendant who, having the opportunity to refute damaging evidence against her, chooses not to. The finder of fact in a civil cause may use a witness' invocation of his Fifth Amendment privilege against self-incrimination to infer that his truthful testimony would have been unfavorable to him.

HERNDON V HERNDON

*BRYANT, J., dissenting*

*Fedoronko v. American Defender Life Ins. Co.*, 69 N.C. App. 655, 657–58, 318 S.E.2d 244, 246 (1984).

*McKillop*, 139 N.C. App. at 63–64 , 532 S.E.2d at 600–01.

[S]ince the power of the court over a witness in requiring proper responses is inherent and necessary for the furtherance of justice, it must be conceded that testimony which is obviously false or evasive is equivalent to a refusal to testify within the intent and meaning of the foregoing statutes, and therefore punishable [by contempt].

*Galyon v. Stutts*, 241 N.C. 120, 124, 84 S.E.2d 822, 825 (1954).

In the instant case, the trial court understood that the purpose of the DVPO hearing was to determine whether sufficient credible evidence existed to support plaintiff's claim that his wife was putting drugs in his food and sneaking out of the house to have an affair with her paramour. The trial court had already heard the paramour take the Fifth Amendment upon being asked a number of questions regarding his relationship with defendant and whether she had shared certain information with him regarding what she may have been doing to her husband. However, unlike Defendant, the paramour was compelled to testify. *See Brown*, 356 U.S. at 155, 2 L. Ed. 2d at 597 ("A witness who is compelled to testify . . . has no occasion to invoke the privilege against self-incrimination until testimony sought to be elicited will in fact tend to incriminate.")

And while defendant had the right to meet the evidence presented against her by plaintiff with evidence of her own, defendant was not compelled to testify on her

own behalf. She did so voluntarily. Based on the initial question and response just prior to her testimony, defendant could be said to have waived the privilege. However, it was within the inherent power of the trial court to ascertain from defendant that she chose to testify voluntarily and waive her privilege against self-incrimination. Further, the trial court's statement was sufficient to put defendant on notice that if she intended to testify, the trial court expected defendant to answer questions truthfully. Notwithstanding the less than artful phraseology, it was ultimately up to the court to determine the scope of the privilege. *See id.* at 156, 2 L. Ed. 2d at 597 ("The interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination.").

Upon hearing the trial court's statement of warning, defendant could have refused to testify, she was not compelled to do so. Instead, she took the stand and testified. The court did not allow plaintiff to cross-examine defendant, but the trial court asked questions of her. Throughout, defendant made no objection to the trial court's admonition and never asserted the privilege against self-incrimination. Moreover, defendant does not claim and the record does not support that she incriminated herself, or that she testified differently because of the trial court's comments. There is no indication from these facts that defendant's Fifth Amendment

HERNDON V HERNDON

*BRYANT, J., dissenting*

rights were violated. Further, neither *Brown*, *McKillop*, nor any other case I have found would support a holding that defendant's Fifth Amendment right against self-incrimination was violated in this case.

If allowed to stand, the majority opinion would grant a defendant the right to use a constitutional privilege, intended as a shield to protect a litigant, to be used as a sword to strike down the inherent authority of the court to oversee the proper conduct of trials. Accordingly, as I see no facts or law as espoused by the majority that amount to a violation of defendant's constitutional right against self-incrimination, I respectfully dissent.