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SHAKESPEARE IN THE COURTS

DOUGLAS E. ABRAMS¹

SIGMA FINANCIAL CORP. V. GOTHAM INSURANCE CO. WAS AN INSURANCE COVERAGE AND PROFESSIONAL NEGLIGENCE SUIT IN FEDERAL DISTRICT COURT.² DURING PRETRIAL PROCEEDINGS, JUDGE ANDREW J. GUILFORD GRANTED PLAINTIFF SIGMA'S MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT TO ADD A DEFENDANT.

Over Gotham's objection, he then granted Sigma's emergency application for permission to file a second amended complaint because Sigma believed the original amendment proposed the wrong new defendant.³

Judge Guilford's opinion accented the second grant by citing and paraphrasing from British playwright William Shakespeare's tragedy, "Romeo and Juliet." "In love," wrote the judge, "a rose by any other name may smell just as sweet, but in lawsuits, naming precisely the right party can mean everything."⁴

Finding that Gotham's objection did not identify any prejudice that the second grant would cause, the court cited and paraphrased from Shakespeare's tragedy, "Hamlet": "perhaps Gotham doth protest too much."⁵

Judge Guilford thus joined the ranks of federal and state judges who, in recent years, have cited and quoted from Shakespeare's plays to spice their written opinions' substantive or procedural rulings.⁶ Judicial invocation of Shakespeare dates back to 1873, when the Supreme Court of Texas quoted from "As You Like It" in a decision that upheld the defendant's indictment for theft of one head of cattle worth \$12.⁷ Soon Shakespeare was invoked by other state supreme courts,⁸ including the Supreme Court of Missouri in 1890 and 1894.⁹ The U.S. Supreme Court invoked Shakespeare in 1893.¹⁰

A Common Theme

This article continues the theme of recent "Writing It Right" articles in the Journal of the Missouri Bar. These ar-

ticles describe how federal and state judges today frequently accent their opinions' substantive or procedural rulings with references to cultural markers that can resonate with the advocates, parties, and judges who comprise the opinions' readership.

The courts' broad array of cultural references demonstrates versatility. Some of my early articles in the Journal profiled judicial opinions that referenced terminologies, rules, and traditions of baseball,¹¹ football,¹² and other sports.¹³ Together these sports' mass audiences help define American culture.¹⁴

Later my Journal articles profiled judicial references to classic television shows and movies that have held Americans' attention for decades.¹⁵ Most recently, I turned along a literary path by profiling judicial references to well-known children's stories, fairy tales, and Aesop's Fables.¹⁶

This article continues along the literary path by turning to recent federal and state judicial opinions that reference plays of Shakespeare (1564-1614). Nearly 40 plays carry his authorship, and they still command attention in the United States and around the world centuries after their appearance.¹⁷ Many of the plays' most famous quotes or phrases (such as the ones invoked in *Sigma*) remain familiar to many Americans, including advocates, parties, and judges.

"More Vivid, More Lively, and . . . More Memorable"

As a collection, my Journal articles (including this one) chronicle a practice by judges who, like Judge Guilford in *Sigma*, invoke popular culture in their opinions. This frequent judicial practice invites advocates also to invoke, where relevant and appropriate, references to cultural markers in their briefs and other written submissions. As I have written before, "advocates should feel comfortable following the courts' lead by carefully referencing [cultural markers] to help sharpen substantive and procedural arguments in the filings they submit."¹⁸

I have also written before that an advocate's invocation of popular culture remains consistent with advice delivered by some of today's leading judges. "Think of the poor judge who is reading . . . hundreds and hundreds of these briefs," says Chief Justice John G. Roberts, Jr. "Liven up their life just a bit . . . with something interesting."¹⁹

Justice Antonin Scalia similarly urged brief writers to "[m]ake it interesting."²⁰ "I don't think the law has to be dull . . . Legal briefs are necessarily filled with abstract concepts



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that are difficult to explain,” Justice Scalia continued.²¹ “Nothing clarifies their meaning as well as examples” that “cause the serious legal points you’re making to be more vivid, more lively, and hence more memorable.”²²

Cultural markers that help define the American experience can offer excellent “examples” that “liven up” written advocacy and “make it interesting” and “more memorable.” Advocates can serve the client’s cause by instilling vitality that carefully relates law to national culture beyond the printed legal page.

A Shakespeare Sampler

In addition to *Sigma Financial Corp.*, here are two of the several recent decisions²³ whose opinions spiced up substantive or procedural rulings by citing and quoting Shakespeare.

*LaFondfx, Inc. v. Kopelman*²⁴

In the breach of contract action, the federal district court denied each party’s motion for sanctions against the other. The defendant alleged that the plaintiff had abused the litigation process by fabricating a document, and the plaintiff countered that the defendant had abused the process by filing its motion.²⁵

The court found that “both parties’ complaints about ‘vexatious’ litigation conduct by the other are not only weak but entirely hypocritical given that both parties, apparently fueled predominantly by animus towards the other, have turned a simple contract dispute into the next *Marbury v. Madison*.”²⁶

The court’s order that denied the parties’ dueling motions concluded by citing and quoting from “Romeo and Juliet”: “a plague o’ both your houses.”²⁷

*United States v. Bary*²⁸

Adel Abdel Bary, a member of a terrorist organization affiliated with al Qaeda, was incarcerated in federal prison on his guilty pleas for conspiracy crimes arising from his dissemination of propaganda leading up to the 1998 bombings of the American embassies in Kenya and Tanzania. In 2020, shortly before his scheduled release date, he moved for compassionate release on the ground that continued confinement put him at high risk of contracting COVID-19. (He was 60 years old and suffered from asthma and obesity, two aggravating conditions identified as attracting the virus.) When released, he would be removed to the United Kingdom on an immigration detainer.²⁹

The federal district court granted the motion about two weeks before Bary’s scheduled release date. On one hand, the court recognized that Bary committed “terrible” crimes as part of the conspiracy that led to the embassy attacks.³⁰ “But his participation is better characterized as spreading propaganda in coordination with the individuals who authorized the attacks. That too was a serious crime, but it was not as serious as the crimes of his co-conspirators.”³¹

On the other hand, the court concluded, “the benefit to society of requiring defendant to serve the final few weeks of his sentence does not outweigh the serious health risks he faces. . . . [T]he sooner defendant’s remaining days of imprisonment end, the greater the chance – in the event he


contracts the virus and the virus proves fatal to him – that he could spend his last days or hours with his family rather in a jail cell.”³²

The *Bary* court quoted at length from Portia’s speech in Shakespeare’s “The Merchant of Venice”:

“The quality of mercy is not strained. It droppeth as the gentle rain from heaven Upon the place beneath. It is twice blest: It blesseth him that gives and him that takes. ‘Tis mightiest in the mightiest; it becomes The throned monarch better than his crown. His scepter shows the force of temporal power. The attribute to awe and majesty Wherein doth sit the dread and fear of kings; But mercy is above this sceptered sway. It is enthroned in the heart of kings; It is an attribute to God himself; And earthly power doth then show like God’s When mercy seasons justice.”³³

The court determined that in the *Bary* case, “the earthly power of the United States should allow mercy to season justice.”³⁴

Conclusion: “A Bit of Life”

This Shakespeare survey illustrates yet again that recitation of cultural markers can accent judicial opinions and written advocacy. The potential reward for advocates and their clients? More than 75 years ago, Judge Wiley B. Rutledge delivered this: “It helps to break the monotony of the printed legal page to add a bit of life now and then. . . . A dull brief may be good law. An interesting one will make the judge aware of this.”³⁵ 

Endnotes

1 Douglas E. Abrams, a University of Missouri law professor, has written or co-written six books, which have appeared in a total of 22 editions. Four U.S. Supreme Court decisions have cited his law review articles. His writings have been downloaded worldwide more than 35,000 times. His latest book is *Effective Legal Writing: A Guide for Students and Practitioners* (West Academic 2d ed. 2021).

Thank you to Sarah Walters (University of Missouri School of Law, Class of 2022) for her excellent research on this article.

2 2016 WL 7508172 (C.D. Cal. Sept. 22, 2016).

3 *Id.* at *1.

4 *Id.*; WILLIAM SHAKESPEARE, *ROMEO AND JULIET*, act 2, sc. 2.

5 *Id.* at *2; WILLIAM SHAKESPEARE, *HAMLET*, act 3, sc. 2.

6 See also, e.g., *American Lung Ass’n v. Environmental Prot. Agency*, 985 F.3d 914, 1011 n.107 (D.C. Cir. 2021) (Walker, J., concurring in part and dissenting in part) (citing *THE TRAGEDY OF MACBETH*); *United States v. Clancy*, 979 F.3d 1135, 1136 (6th Cir. 2020) (citing and quoting from *OTHELLO*); *Hewitt v. Helix Energy Solutions Group*, 983 F.3d 789, 809 n.39 (5th Cir. 2020) (Wiener, Jr., J., dissenting) (citing and quoting from *THE TRAGEDY OF MACBETH*); *United States v. Mayendia-Blanco*, 905 F.3d 26 (1st Cir. 2018) (quoting *HAMLET*, *THE MERCHANT OF VENICE*, *THE MERRY WIVES OF WINDSOR*, *HENRY IV*, and *MUCH ADO ABOUT NOTHING*); *Reed-Union Corp. v. Turtle Wax, Inc.*, 77 F.3d 909, 914 (7th Cir. 1996) (citing *ROMEO AND JULIET*); *United States v. Bolton*, 2021 WL 131445, *5 n.5 (D.D.C. Jan. 14, 2021); *United States v. Madison*, 2020 WL 7768460 *6 (M.D. Fla. Dec. 30, 2020) (citing and quoting from *HAMLET*); *Oakwood Univ., Inc. v. Oakwood Univ. Alumni Ass’n*, 2020 WL 4732074 *2 n.6 (N.D. Ala. Aug. 14, 2020) (citing and quoting from *ROMEO AND JULIET*); *Gross v. Chapman*, 2020 WL 4336062 *1 (N.D. Ill. July 28, 2020) (magistrate judge’s opinion) (citing and quoting from *ROMEO AND JULIET*); *Rodgers v. Guyoungtech USA, Inc.*, CA 07-0837-WS-C *3 (S.D. Ala. Sept. 2, 2008) (citing and quoting from *HENRY IV*); *North Jackson Pharmacy, Inc. v. Caremark RX, Inc.*,

385 F.Supp.2d 740, *1 (N.D. Ill. Nov. 3, 2004) (citing and quoting from KING JOHN); *H.V. Collins Co. v. Williams*, 990 A.2d 845, 846 n.1 (R.I. 2010) (citing and quoting from THE MERRY WIVES OF WINDSOR); *Nassa v. Hook-SupeRx, Inc.*, 790 A.2d 368 (R.I. 2002) (quoting citing and quoting from OTHELLO and KING RICHARD II); *Facey v. Facey*, 249 Md.App.584, *115 n.13 (Md. Ct. Spec. App, Feb. 26, 2021) (citing and quoting from ALL'S WELL THAT ENDS WELL); *In re Altschul*, 2020 WL 7867282, *1 (Tex. Ct. App. Dec. 30, 2020) (citing and quoting from HAMLET); *R & R Capital, LLC v. Buck & Doe Run Valley Farms, LLC*, 2008 WL 3846318 *1 n.1, *8 n. 55 (Del. Ct. Chancery Aug. 19, 2008) (citing and quoting from HAMLET and ALL'S WELL THAT ENDS WELL); *Safford v. Pitney Bowes, Inc.*, 1995 WL 263516 *1 (Conn. Super. Ct. Apr. 24, 1995) (citing and quoting from ROMEO AND JULIET).

7 *State v. Murphy*, 39 Tex. 46, 46 (1873).

8 *See, e.g., Walton v. Bristol*, 34 S.E. 544, 547 (N.C. 1899) (Clark, J., dissenting) (quoting from THE TAMING OF THE SHREW); *State v. Snover*, 63 N.J.L. 382, 384 (N.J. 1899) (citing and quoting from THE MERRY WIVES OF WINDSOR); *State v. Langford*, 33 S.E. 370, 371 (S.C. 1899) (quoting from JULIUS CAESAR); *Sims v. State*, 36 S.W. 256 (Tex. Ct. Crim. App. 1896) (quoting from KING JOHN); *Matts v. Borba*, 37 P. 159, 160 (Cal. 1894) (quoting from THE MERRY WIVES OF WINDSOR); *State v. Richards*, 27 A. 122, 123 (1893) (quoting from HAMLET); *Holyoke v. Holyoke*, 6 A. 827, 828 (Me. 1886) (quoting from HAMLET); *Wood v. State*, 18 Fla. 967, 969 (1882) (quoting from HENRY IV).

9 *State v. Wisdom*, 24 S.W. 1047, 1051 (Mo. 1894) (citing and quoting from RICHARD III); *State v. Stratman*, 13 S.W. 814, 817 (Mo. 1890) (quoting from THE PASSIONATE PILGRIM).

10 *Magone v. Heller*, 150 U.S.70, 74 (1893) (quoting from TIMON OF ATHENS).

11 Douglas E. Abrams, *References to Baseball In Judicial Opinions and Written Advocacy*, 72 J. Mo. Bar 268 (Sept.-Oct. 2016).

12 Douglas E. Abrams, *References to Football In Judicial Opinions and Written Advocacy*, 73 J. Mo. Bar 34 (Jan.-Feb. 2017).

13 Douglas E. Abrams, *References to Spring's Championship Sports In Judicial Opinions and Written Advocacy*, 73 J. Mo. Bar 168 (May-June 2017).

14 *See, e.g., Butts v. National Collegiate Athletic Ass'n*, 751 F.2d 609, 612 (3d Cir. 1984) (discussing America's "sports dominated culture").

15 Douglas E. Abrams, *References to Television Shows In Judicial Opinions and Written Advocacy (Part 1)*, 75 J. Mo. Bar 25 (Jan.-Feb. 2019); Douglas E. Abrams, *References to Television Shows In Judicial Opinions and Written Advocacy (Part 2)*, 75 J. Mo. Bar 85 (Mar.-Apr. 2019); Douglas E. Abrams, *References to Movies In Judicial Opinions and Written Advocacy (Part 1)*, 75 J. Mo. Bar 222 (Sept.-Oct. 2019); Douglas E. Abrams, *References to Movies In Judicial Opinions and Written Advocacy (Part 2)*, 75 J. Mo. Bar 297 (Nov.-Dec. 2019).

16 Douglas E. Abrams, *References to Children's Stories and Fairy Tales In Judicial Opinions and Written Advocacy*, 76 J. Mo. Bar 212 (Sept.-Oct. 2020); Douglas E. Abrams, *References to Aesop's Fables In Judicial Opinions and Written Advocacy*, 77 J. Mo. Bar 24 (Jan.-Feb. 2021).

17 *See, e.g., THE COMPLETE WORKS OF WILLIAM SHAKESPEARE* (2004 ed.).

18 Douglas E. Abrams, *References to Television Shows In Judicial Opinions and Written Advocacy (Part 1)*, 75 J. Mo. Bar 25, 25 (Jan.-Feb. 2019).

19 Bryan A. Garner, *Interviews With Supreme Court Justices: Chief Justice John G. Roberts, Jr.*, 13 *Scribes J. Legal Writing* 5, 18 (2010).

20 Antonin Scalia & Bryan A. Garner, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* 112 (2018).

21 *Id.* at 111, 122.

22 *Id.*

23 *See also* cases cited in note 6 *supra*.

24 2017 WL 2865505 (D. Colo. May 9, 2017).

25 *Id.* at *1.

26 *Id.*

27 *Id.* at n.1.; WILLIAM SHAKESPEARE, *ROMEO AND JULIET*, act 3, sc.1.

28 2020 WL 5946985 (S.D.N.Y. Oct. 7, 2020).

29 *Id.* at *1.

30 *Id.*

31 *Id.* at *3.

32 *Id.* WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE*, act 4, sc.1.

33 2020 WL 5946985 at *3.

34 *Id.* at *4.

35 Wiley B. Rutledge, *The Appellate Brief*, 28 A.B.A. J. 251, 254-55 (1942).

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