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“PROVERBIALY SPEAKING”: ROTTEN APPLES, PHILADELPHIA LAWYERS AND RED COWS

Scott D. Makar*

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One unethical lawyer, like the proverbial “rotten apple,” can spoil the bunch.¹ A complex document requires the proverbial “Philadelphia lawyer” to interpret it.² The rare commanding precedent that is directly on point is the proverbial “red cow” case.³ All of these are examples of proverbial speech, the communication of wisdom through well-known idioms or clichés. This article explores how Florida judges have used proverbial speech in their opinions. Judges speak proverbially, on occasion,⁴ to explain or emphasize legal or equitable principles, to pass along wisdom, or to simply express facts or law in a colloquial way. By speaking proverbially, judges use an expressive technique that can inform, familiarize and sometimes entertain readers of their opinions. This article concludes with comments on whether attorneys should speak proverbially in their submissions to Florida courts.

I. TYPES OF PROVERBIAL SPEECH

Proverbial speech by definition is expression involving the use of a proverb. But the term proverb has several different meanings, and significant

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1. *State ex rel. Florida Bar v. Murrell*, 74 So. 2d 221, 224 (Fla. 1954) (Terrell, J.) (en banc).

2. *Mark v. Hahn*, 177 So. 2d 5, 8 (Fla. 1965) (Hobson, J.).

3. *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1390 n.2 (11th Cir. 1993) (Carnes, J.).

4. A WESTLAW search (FL-CS-ALL: proverb!) identified approximately 110 published Florida opinions in Southern and Southern Second Reporters and approximately 35 opinions arising from Florida federal courts. Because the use of a proverb does not necessarily contain the words proverbial or proverb, there are undoubtedly more examples than this limited search located.

scholarship has not resulted in a unified definition.⁵ A standard dictionary definition is “A short pithy saying in common and recognized use; a concise sentence, often metaphorical or alliterative in form, held to express some general truth.”⁶ The word proverbial means something “used or current as a proverb” that is well known, notorious or familiar.⁷ For this reason, it is not surprising that courts allude to the “proverbial ordinary man in the street” in support of commonly-held wisdom.⁸ One academic study determined that a proverb is commonly thought of as “a phrase, saying, sentence, statement, or expression of the folk which contains above all wisdom, truth, morals, experience, lessons, and advice concerning life and which has been handed down from generation to generation.”⁹ The study noted, however, that the shortest general definition is simply as follows: “A proverb is wisdom expressed in a sentence.”¹⁰

The practice of proverbial speech generally involves the use of secular allusions, idioms and cliches rather than maxims ascribed to religious sources. However, reported Florida cases do contain a few references to *Proverbs* in the *Old Testament*,¹¹ and on occasion, a Chinese or oriental proverb appears.¹²

5. WOLFGANG MIEDER, *PROVERBS ARE NEVER OUT OF SEASON: POPULAR WISDOM IN THE MODERN AGE 18-40* (1993) (noting the problems associated with defining a proverb).

6. See 2 *THE NEW SHORTER OXFORD ENGLISH DICTIONARY* 293 (1993).

7. *Id.*

8. See, e.g., *Nigro v. Miami Herald Publishing Co.*, 262 So. 2d 698, 700 (Fla. 3d DCA 1972) (Hendry, J.).

9. MIEDER, *supra* note 5, at 24.

10. *Id.*

11. *Legare v. United States*, 195 F. Supp. 557, 561 (S.D. Fla. 1961) (“Her price is ‘far above rubies,’ (*Proverbs* 31:10)”; *Cerf v. State*, 458 So. 2d 1071, 1072 (Fla. 1984) (quoting *Proverbs* 28:01); *Pressley v. Wainwright*, 367 So. 2d 222, 224 (Fla. 1979) (citing *Jonah* 1:17); *Williamson v. Williamson*, 22 So. 2d 578, 579 (Fla. 1945) (quoting party’s reference to *Proverbs* 21:9); *Nolen v. Nolen*, 163 So. 401, 402 (Fla. 1935) (quoting *Proverbs* 21:9 & 25:24 which states: “It is better to dwell in a corner of a housetop than with a brawling woman in a wide house.”); *Gill v. Gill*, 145 So. 758, 760 (Fla. 1933) (Davis, J., concurring specially) (“[L]ike the foolish woman referred to by Solomon in his *Proverbs*, ‘buildeth not her house, but plucketh it down with her hands.’”); *Ex rel J.K.*, 581 So. 2d 940, 941 n.1 (Fla. 4th DCA 1991) (quoting *Proverbs* 28:1); *Bastien v. State*, 522 So. 2d 550, 550 n.1 (Fla. 5th DCA 1988) (citing *Proverbs* 28:1); *Eagle v. Benefield-Chappell, Inc.*, 476 So. 2d 716, 719 (Fla. 4th DCA 1985) (citing *Proverbs* 22:1); *Homestead College of Bible v. State Bd. of Indep. Colleges & Univs.*, 278 So. 2d 679, 681 (Fla. 1st DCA 1973) (citing *Proverbs* 1:2, 3, 5, & 7); see also *North v. State*, 65 So. 2d 77 (Fla. 1953) (preacher reading *Proverbs* in happenstance meeting with jurors not grounds for reversal of defendant’s conviction).

12. See, e.g., *Lacentra Trucking, Inc. v. Flagler Fed. Sav. & Loan Ass’n of Miami*, 586 So. 2d 474, 476 (Fla. 4th DCA 1991) (“[O]ld Chinese proverb that ‘a journey of a thousand miles begins with a single step.’”) (Farmer, J.); *McDaniels v. State*, 583 So. 2d 349, 358 (Fla. 4th DCA 1991) (“An ancient Oriental proverb suggests: It is better to light a candle than to curse the darkness.”) (Glickstein, J., concurring specially) (citing ALEX KOTLOWITZ, *Preface to THERE ARE NO CHILDREN HERE* (1991)).

An effective proverb is easily understood in the context in which it is used. For instance, courts use commonly-known proverbs as well as legal proverbs.¹³ Some commonly-known proverbs include: the “proverbial Catch-22” situation,¹⁴ being caught between “a rock and a hard place,”¹⁵ getting “nailed to the proverbial wall”¹⁶ and “winning the battle but losing the war.”¹⁷ Lawyers are undoubtedly familiar with the “proverbial ‘fishing expedition’,”¹⁸ “hard cases make bad law,”¹⁹ the “proverbial second bite at the apple”²⁰ and the “proverbial key to the courthouse door.”²¹

In their enthusiasm, courts sometimes use mixed or dual proverbs. One example is a truck driver killed in an accident described as “put in a position of having to walk a greased tightrope over the proverbial bottomless pit” in order to make a delivery.²² Another court used the following double allusion: “To close our eyes to such facts of common knowledge would render us little more perceptive than a mule with blinders on his bridle or the proverbial ostrich with his head in the sand.”²³

Mythological and foreign language proverbs are used, though infrequently. Examples include:

- Litigant’s claim, “like the proverbial phoenix, keeps rising from its own ashes.”²⁴

13. Legal proverbs are those recognized principally in the legal community. See MIEDER, *supra* note 5, at 12 (noting examples such as “Let the buyer beware.” and “Possession is nine-tenths of the law.”).

14. *Stonewall Ins. Co. v. Heter*, 438 So. 2d 950, 952 (Fla. 4th DCA 1983) (Dell, J.).

15. *Canal Auth. of Fla. v. Ocala Mfg., Ice & Packing Co.*, 332 So. 2d 321, 326 (Fla. 1976) (Sundberg, J.); *Hollywood Beach Hotel Co. v. City of Hollywood*, 329 So. 2d 10, 15 (Fla. 1976); *Dorch v. State*, 483 So. 2d 851, 852 (Fla. 1st DCA 1986) (Nimmons, J.); *State v. Schmidt*, 474 So. 2d 899, 902 (Fla. 5th DCA 1985) (Dauksch, J.); *A.E.K. v. State*, 432 So. 2d 720, 721 (Fla. 3d DCA 1983) (Pearson, J.); *In re Estate of Wilisch*, 384 So. 2d 223, 225 (Fla. 3d DCA 1980) (Pearson, J.).

16. *Ream v. State*, 449 So. 2d 960, 962 (Fla. 4th DCA 1984) (Glickstein, J., concurring).

17. *Childers v. American Auto. Ass’n*, 424 So. 2d 116, 118 (Fla. 1st DCA 1982) (Wigginton, J.).

18. *O’Rear v. American Family Life Assurance Co.*, 784 F. Supp. 1561, 1564 (M.D. Fla. 1992) (Kovachevich, J.).

19. *Olhausen v. Department of Business Regulation, Div. of Beverages & Tobacco*, 472 So. 2d 514, 516 (Fla. 3d DCA 1985) (Schwartz, C.J.); *McKelvey v. Kismet, Inc.*, 430 So. 2d 919, 925 (Fla. 3d DCA 1983) (Ferguson, J., dissenting).

20. *Dimitt Chevrolet, Inc. v. Southern Fidelity Ins. Co.*, 636 So. 2d 700, 711 (Fla. 1993) (Overton, J., dissenting).

21. *The Florida Bar Re Amendment to the Code of Professional Responsibility (Contingent Fees)*, 494 So. 2d 960, 968 (Fla. 1986) (Barkett, J., concurring and dissenting).

22. *Zipkin v. Rubin Constr. Co.*, 418 So. 2d 1040, 1044 (Fla. 4th DCA 1982) (Anstead, J., dissenting).

23. *Braswell v. State*, 306 So. 2d 609, 612 (Fla. 1st DCA 1975) (Boyer, J.).

24. *Rihon v. Wilson*, 458 So. 2d 378, 379 (Fla. 4th DCA 1984) (Glickstein, J.).

- The latin proverb, “Incidit in Scyllam qui vult vitare Charybdim,” means that “in our eagerness to avoid one evil, we often fall into greater.”²⁵ Variations of this proverb are “caught between the proverbial ‘devil and the deep blue sea’”²⁶ and “between the proverbial rock and the whirlpool.”²⁷
- City held the “proverbial sword of Damocles” over the plaintiffs.²⁸

The scarcity of these types of proverbs might be attributed to the belief that they are obscure or unfamiliar. Nevertheless, courts historically have not shied away from latin legal phrases, despite the average reader’s ignorance of their meaning.

A. *Use to Explain, Describe and Familiarize*

Florida courts have used proverbs to explain the context of their opinions or the nature of the legal principle applied or announced. Attorneys know that “useless laws diminish the authority of necessary ones,”²⁹ the strict application of dogma to facts can result in “the proverbial ‘exception that proves the rule,’”³⁰ and the “identification of strangers is proverbially untrustworthy.”³¹ Other examples include:

- “[I]n this case the law has been mechanically misapplied and perfectly illustrates the proverbial collision of reason and an abstract rule.”³²
- Law does not punish “bad thoughts alone” because they are “like the proverbial tree falling in the unoccupied forest” and have “no cognizable effect.”³³

25. Paddock v. Chacko, 522 So. 2d 410, 415 n.7 (Fla. 5th DCA 1988) (Orfinger, J.).

26. City of Ocala v. Marion County Police Benevolent Ass’n, 392 So. 2d 26, 30 (Fla. 1st DCA 1980) (Wenworth, J.).

27. Thomas Jefferson, Inc. v. Hotel Employees Union, 81 So. 2d 731, 733 (Fla. 1955) (per curiam).

28. Cuban Museum of Arts & Culture, Inc. v. City of Miami, 766 F. Supp. 1121, 1129 (S.D. Fla. 1991) (King, C.J.).

29. Conyers v. Glenn, 243 So. 2d 204, 205 (Fla. 2d DCA 1971) (Mann, J.).

30. Davis v. Evans, 132 So. 2d 476, 480 (Fla. 1st DCA 1961) (Sturgis, J.).

31. State v. Fischer, 387 So. 2d 473, 476 (Fla. 5th DCA 1980) (quoting United States v. Wade, 388 U.S. 218, 228 (1967)).

32. Gonzalez v. Gonzalez, 413 So. 2d 97, 98 (Fla. 3d DCA 1982) (Ferguson, J., dissenting).

33. State v. Irvin, 482 So. 2d 461, 463 (Fla. 5th DCA 1986) (Barfield, J.).

- Statutory provision “is not worth the proverbial plugged nickel” because of constitutional provision that superseded it.³⁴
- Government must be “conducted uprightly” and not “by favorites and old cronies” who proceed on theory of “the old proverb — ‘Whose bread one eats, his song he will sing.’”³⁵

Each of these examples use legal maxims colloquially or express legal principles in an aphoristic way.

Difficult cases also lend themselves to proverbial references. For instance, if justice requires that a court “must take the proverbial ‘deep breath and swallow’ and undo an act which at the time it was done was seemingly correct in order to reach what is now perceived to be a just determination then so be it!”³⁶ Otherwise, judges “would be burying [their] heads in the sand like the proverbial ostrich” in an effort to avoid the real issues at hand.³⁷

An interesting example of proverbial speech is the Philadelphia lawyer invoked by some Florida courts to describe the complexity, or lack thereof, of language in legal documents. The phrase was first used in Florida in 1965 to construe contracts against their drafters.³⁸ It soon became a popular reference, as indicated by the following examples:

- “[S]o long as [insurance] contracts are drawn in such a manner that it requires the proverbial Philadelphia lawyer to comprehend [them], the courts should and will construe them liberally in favor of the insured”³⁹

34. *Foerester v. Foerester*, 300 So. 2d 33, 35 (Fla. 1st DCA 1974), *aff'd but opinion vacated sub. nom.*, *Williams v. Foerester*, 335 So. 2d 810, 811 (Fla. 1976).

35. *Johnson v. Trader*, 52 So. 2d 333, 336 (Fla. 1951) (Terrell, J.).

36. *Perkins v. Pare*, 352 So. 2d 64, 65 (Fla. 4th DCA 1977) (Mager, C.J.).

37. *Bludworth v. Arcuri*, 416 So. 2d 882, 884 (Fla. 4th DCA 1982) (Glickstein, J.); *Poirier v. Division of Health*, 351 So. 2d 50, 55 (Fla. 1st DCA 1977) (party “may not stick his head in the sand like the proverbial ostrich” and claim lack of knowledge) (Nathan, J.).

38. The first reference appears in *Mark v. Hahn*, 177 So. 2d 5, 8 (Fla. 1965) (Hobson, J.) (wording in agreement should not “require the astuteness of the proverbial ‘Philadelphia lawyer’” to interpret it); *see Curran & MacDonell v. Pearre*, 202 So. 2d 858 (Fla. 1st DCA 1967) (citing *Hahn*, 177 So. 2d at 5).

39. *Hartnett v. Southern Ins. Co.*, 181 So. 2d 524, 528 (Fla. 1965) (Drew, J.). *See Mathews v. Ranger Ins. Co.*, 281 So. 2d 345, 349 (Fla. 1973) (quoting *Hartnett*, 181 So. 2d at 528); *Fountainbleu Hotel Corp. v. United Filigree Corp.*, 298 So. 2d 455, 458 (Fla. 3d DCA 1974) (quoting *Hartnett*, 181 So. 2d at 528); *Daleo v. Bert & Bette Bayfront 66 Marine*, 273 So. 2d 113, 116 (Fla. 3d DCA 1973) (quoting *Hartnett*, 181 So. 2d at 528).

- “We are convinced that the proverbial Philadelphia lawyer could not explain all the legal issues raised by these confusing documents.”⁴⁰
- “[I]t requires no proverbial ‘Philadelphia lawyer’ to detect” what the parties in this case intended.⁴¹

Florida courts have used the phrase Philadelphia lawyer more often than Pennsylvania courts.⁴² The meaning of the phrase in Florida appears to have a slightly different hue than in Pennsylvania. In Florida, the phrase means a lawyer who is particularly astute, crafty or shrewd.⁴³ In contrast, the two references reported in Pennsylvania cases use the phrase “smart as a Philadelphia lawyer” to describe a renowned attorney⁴⁴ who is at “the top of the legal profession.”⁴⁵ The original renowned Philadelphia lawyer was Andrew Hamilton who brilliantly defended John Peter Zenger in the famous 1734 seditious libel trial in New York City.⁴⁶

The advent of politically-correct speech may render certain types of proverbial speech subject to censure. For instance, one court stated: “The proverbial fury of a woman scorned is undoubtedly matched by that of an appellant’s lawyer whose well-presented case is rewarded with a decision stating tersely, ‘per curiam, affirmed.’”⁴⁷ What the “proverbial ‘reasonable man’”⁴⁸ would do under the circumstances presented is now better expressed as what a reasonable person of the plaintiff’s sex would do (although some legal jockeying continues on this issue).⁴⁹ Of course, the use of the

40. *Quick Cash of Clearwater, Inc. v. Florida Dep’t of Agric. & Consumer Serv.*, 605 So. 2d 898, 900 (Fla. 2d DCA 1992) (Altenbrand, J.).

41. *Smith v. Codos*, 311 So. 2d 195, 197 (Fla. 3d DCA 1975) (Hendry, J.).

42. Fourteen cases in Florida refer to the proverbial Philadelphia lawyer. In contrast, only two cases from Pennsylvania make such references. *In re Mack*, 126 A.2d 679, 684 n.1 (Pa. 1956); *O’Donnell v. Philadelphia Record Co.*, 51 A.2d 775, 790 n.3 (Pa. 1947).

43. *Harbour Inn v. Kagan*, 343 So. 2d 1353, 1356 (Fla. 2d DCA 1977) (Grimes, J., dissenting) (“However, not being the ‘Philadelphia lawyer’ . . . I doubt I would have understood [the meaning of this provision].”); *Warter v. Bancroft Hotel Assocs.*, 285 So. 2d 676, 678 (Fla. 3d DCA 1973) (“astuteness of the proverbial ‘Philadelphia Lawyer’” not required to determine party’s intention) (per curiam) (citing *Hahn*, 177 So. 2d at 8).

44. *O’Donnell*, 51 A.2d at 790 n.3.

45. *Mack*, 126 A.2d at 684 n.1.

46. *Id.*

47. *Brastrom v. Grider*, 215 So. 2d 501, 501 (Fla. 4th DCA 1968) (Owen, J.).

48. *Plantation Key Developers, Inc. v. Colonial Mortg. Co. of Ind., Inc.*, 589 F.2d 164, 173 (5th Cir. 1979) (Fay, J.); *Horne v. Sewell*, 118 So. 2d 643, 646 (Fla. 1st DCA 1960) (Carroll, J.).

49. *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367, 369 (1993) (discussion of trial court’s application of reasonable woman standard); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1507 (M.D. Fla. 1991) (applying reasonable woman standard); see generally Bonnie B. Westman, *The Reasonable Woman Standard: Preventing Sexual Harassment in the Workplace*, 18 WM. MITCHELL L. REV. 795 (1992) (advocating “reasonable woman” standard instead of “reasonable person” standard).

phrases “indulgence in the proverbial ‘couple of beers’”⁵⁰ and the “proverbial ‘night out with the boys,’”⁵¹ though viewed with some disfavor in the law, is now subject to even greater societal disapproval.

Courts also use proverbial speech to characterize facts or to intimate how judges view the case. Examples include the following:

- A settlement was “the proverbial pittance in comparison to the actual value of the claim.”⁵²
- Property was not “the proverbial Dutch Boy finger in the dike holding back the flood[.]”⁵³
- Inconsistent jury verdict is “the proverbial fly in the ointment.”⁵⁴
- Zoning change will pave the way for residential classification to topple “like the proverbial house of cards.”⁵⁵
- It “takes only the proverbial ‘wisp-of-the-wind’ to tilt” the balance between the life and death of a defendant charged with a capital crime.⁵⁶
- IRS audit process was “proverbial pebble which unleashes an avalanche.”⁵⁷
- Police seized pistols and money “in the proverbial brown paper bag.”⁵⁸

Other examples portray the facts favorably or unfavorably against a litigant or witness, and signal how the court may decide the case.

- An “employee who suddenly decides to walk off the job, leaving his employer holding the proverbial bag[.]”⁵⁹
- A developer who relied on a town whose actions “in effect invited the developer onto the proverbial welcome mat[.]”⁶⁰

50. *N & L Auto Parts Co. v. Doman*, 111 So. 2d 270, 273 (Fla. 1st DCA 1959) (Sturgis, J., dissenting).

51. *Lazarus v. Faircloth*, 301 F. Supp. 266, 272 (S.D. Fla. 1969) (Cabot, J.).

52. *International Action Sports, Inc. v. Sabellico*, 573 So. 2d 928, 929 (Fla. 3d DCA 1991) (Schwartz, J.).

53. *Dade County v. Frohme*, 489 So. 2d 140, 141 (Fla. 3d DCA 1986).

54. *Lindquist v. Covert*, 279 So. 2d 44, 45 (Fla. 4th DCA 1973) (Reed, C.J.).

55. *Smith v. City of Miami Beach*, 213 So. 2d 281, 283 (Fla. 3d DCA 1968) (Barkdull, J.).

56. *Reddick v. State*, 190 So. 2d 340, 345 (Fla. 2d DCA 1966) (Pierce, J.).

57. *Burns v. United States*, 1990 WL 138240, *1 (S.D. Fla. 1990) (Hoeveler, J.).

58. *Katsaris v. United States*, 499 F. Supp. 282, 283 (N.D. Fla. 1980) (Higby, J.).

59. *ITT Continental Baking Co. v. Davila*, 388 So. 2d 1254, 1258 (Fla. 2d DCA 1980) (Boardman, J.).

60. *Pasco County v. Tampa Dev. Corp.*, 364 So. 2d 850, 852 (Fla. 2d DCA 1978) (Ryder, J.).

- A husband had the “proverbial chip on his shoulders.”⁶¹
- Victim of personnel action got the “proverbial ‘raw deal[.]’”⁶²
- A shareholder’s action would result in “the proverbial rug” being “pulled from beneath [debtor].”⁶³

Proverbial speech can arise from regional or local legal expressions. An interesting example of legal vernacular derived from a local Floridian proverb is the term a “red cow” case. Attorneys nationwide probably understand that “the proverbial ‘case on all fours’”⁶⁴ means a case that is a highly persuasive precedent or fits a situation “like the proverbial glove.”⁶⁵ Lesser known is the phrase a red cow case that has a similar meaning, but apparently is used almost exclusively in Florida.⁶⁶

The definition of a red cow case recently appeared in an Eleventh Circuit court opinion.

The term “red cow” is used in some legal circles, particularly in Florida, to describe a case that is directly on point, a commanding precedent. In other states, the same notion of a closely fitting authoritative decision is conveyed by any of the following terms: “spotted dog,” “spotted horse,” “white pony,” or “goose” case.⁶⁷

The origin of the phrase is murky. The earliest reference to a red cow case appears, not in Florida, but in a 1959 opinion by the New Mexico Supreme Court.⁶⁸ This is the only reference, however, to a red cow case in any jurisdiction other than Florida.

The first Florida reference is a 1962 Florida Supreme Court case written by Justice Terrell, in which he states that a cited case “comes as near to

61. *Hooper v. Stokes*, 145 So. 855, 857 (Fla. 1933) (Terrell, J.).

62. *Roberts v. Gadsden Memorial Hosp.*, 835 F.2d 793, 802 (11th Cir. 1988) (Spellman, D.J., sitting by designation).

63. *In re Weisser*, 1 B.R. 206, 212 (M.D. Fla. 1979) (Scott, J.).

64. *State v. Hunter*, 586 So. 2d 319, 321 (Fla. 1991) (McDonald, J.).

65. *Allen v. Guagliardo*, 204 So. 2d 349, 350 (Fla. 2d DCA 1967) (Hensley, J.).

66. *Law v. Blue Lagoon-Pompano*, 470 So. 2d 33, 34 (Fla. 4th DCA 1985) (Glickstein, J.) (court rendered its decision “without the proverbial red cow”).

67. *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1390 n.2 (11th Cir. 1993) (citations omitted). Why the opinion’s author, Judge Carnes of Alabama, chose to use and define the phrase is unclear. Perhaps because the case arose in the Southern District of Florida or counsel for one of the parties used the phrase in an appellate brief or at oral argument.

68. *Application of C.B. Sedillo*, 347 P.2d 162, 164, 66 N.M. 267, 270 (N.M. 1959) (Carmody, J.) (“[W]e feel that [these cases] are almost what might be termed ‘red cow’ cases.”).

being a 'red cow' case . . . as one will find in the practice[.]”⁶⁹ Within a year, Judge Carroll of the First District clarified that “finding a 'red cow' precedent is not essential to the application of a recognized principle or rule.”⁷⁰ Next, Judge Byron Simpson’s dissent in a 1964 Fifth Circuit court opinion stated that he “was taught that a 'red cow case', either for or against you, was dispositive.”⁷¹ Soon thereafter, Justice Hobson of the Florida Supreme Court officially recognized the red cow case as part of the common legal vernacular.⁷²

Since 1964, Florida state courts have continued to make references to the proverbial red cow case,⁷³ the most recently noted in 1985.⁷⁴ In one case, the court found “[t]he most perfect example of a 'red cow case' which our research has ever disclosed,” in a 1912 Florida Supreme Court case involving the “stealing of a cow with a red head.”⁷⁵ Prior to the Eleventh Circuit’s recent revival of the phrase, however, only two other Florida federal court references exist: one in a 1975 opinion by Judge Warren L. Jones⁷⁶ and another in 1982 by Judge Charles R. Scott.⁷⁷ The theory that the phrase originated in a law course at the University of Florida is buttressed by the fact that a number of the judges using the phrase had attended law school there during this time period.⁷⁸ Unfortunately, the search for a conclusive answer may continue “until the cows come home.”⁷⁹

69. *Zerwal v. Caribbean Modes, Inc.*, 145 So. 2d 878, 879 (Fla. 1962). The Florida Supreme Court’s reference to the allegation “that one red cow was killed near 57-mile post at 5:15 P.M.” in *Jacksonville, T. & K.W. Ry. v. Garrison*, 11 So. 926, 928 (Fla. 1892), does not count.

70. *Crutchfield v. Adams*, 152 So. 2d 808, 812 (Fla. 1st DCA 1963) (Carroll, C.J.).

71. *Steinhort v. IRS*, 335 F.2d 496, 506 (5th Cir. 1964) (Simpson, J., dissenting). The case arose in the Southern District of Florida.

72. *Stark v. Vasquez*, 168 So. 2d 140, 141 (Fla. 1964) (Hobson, J.).

73. *Davis v. State*, 436 So. 2d 196, 199 (Fla. 4th DCA 1983) (noting inability to “point to a 'red cow' to support” its conclusion) (Glickstein, J.); *State Farm Mut. Auto. Ins. Co. v. Gordon*, 319 So. 2d 36, 37 (Fla. 1st DCA 1975) (Boyer, C.J.) (noting that the parties’ briefs “cite no 'red cow' precedent nor does our independent research reveal any”).

74. *Law v. Blue Lagoon-Pompano, Inc.*, 470 So. 2d 33, 34 (Fla. 4th DCA 1985) (Glickstein, J.) (reaching its decision “without the proverbial red cow to follow”).

75. *State v. Dull*, 249 So. 2d 758, 759 (Fla. 1st DCA 1971) (Wigginton, J.) (citing *Jones v. State*, 59 So. 892 (Fla. 1912)).

76. *Orr v. MacNeill & Sons, Inc.*, 511 F.2d 166, 179 (5th Cir. 1975) (arising from Southern District of Florida).

77. *United States v. Kopituk*, 690 F.2d 1289, 1308 (11th Cir. 1982) (arising from Southern District of Florida).

78. In addition, a number of attorneys recall first hearing the phrase while at the University of Florida College of Law. See, e.g., interviews with Raymond Ehrlich, former Florida Supreme Court Chief Justice, & John M. McNatt, Jr., in Jacksonville, Fla. (Feb. 2, 1996).

79. *Bosley v. Andrews*, 142 A.2d 263, 280 (Pa. 1958) (Musmanno, J., dissenting) (“I shall continue to dissent . . . until the cows come home.”).

B. *Use to Chastise, Chide or Reprimand*

Proverbial speech is often used to chastise, chide or reprimand attorneys, their legal arguments and sometimes even their clients' conduct. Courts use proverbs to make veiled references to improper attorney conduct, as the following illustrate:

- Improper statement by prosecutor was “proverbial straw that breaks the camel’s back.”⁸⁰
- A per se rule of reversal for inappropriate and intemperate prosecutorial comments is unnecessary because “Florida’s prosecutors are too intelligent and disciplined a lot to require a lick between their collective eyes by such a two by four to get their attention as did the proverbial mule of jokelore.”⁸¹

Chiding attorneys for their litigiousness, verbosity or ineptness is also fair game.

- In citing to “an ancient proverb equating lawsuits to ‘fruit trees planted in a lawyer’s garden[,]’” a court warned attorneys to be wary lest lawmakers “limit the amount of fruit which can be harvested from those trees.”⁸²
- Court “read and reread” plaintiff’s complaint which “allege[s] almost everything but the proverbial kitchen sink[.]”⁸³
- Asserting “generalized grounds of appeal apparently designed to cover any case, but which, like the proverbial Old Mother Hubbard, ‘covers everything but touches nothing’ are disfavored and may result in summary disposition.”⁸⁴

80. *Valdez v. State*, 613 So. 2d 916, 918 (Fla. 4th DCA 1993) (per curiam); *see also Shores Dev., Inc. v. Carver*, 164 So. 2d 803, 804 (Fla. 1964) (Caldwell, J.) (work-connected incident was proverbial straw because pre-existing condition existed); *Cem-A-Care of Fla., Inc. v. Automated Planning Sys., Inc.*, 442 So. 2d 1048, 1049 (Fla. 4th DCA 1983) (continuance was proverbial straw based on party’s past dilatory actions and court sanctions) (per curiam).

81. *Killings v. State*, 583 So. 2d 732, 733 (Fla. 1st DCA 1991) (Miner, J., concurring).

82. *Division of Admin. v. Denmark*, 354 So. 2d 100, 103 (Fla. 4th DCA 1978) (Letts, J.). This decision also includes one of the rarest of flattering judicial commentaries: a court expressly recognizing an attorney for “one of her characteristically well written briefs.” *Id.* *See also Florida Power & Light Co. v. Flichtbell*, 475 So. 2d 1250, 1252 (Fla. 5th DCA 1985) (quoting *Denmark*, 354 So. 2d at 103).

83. *Broward County v. Payne*, 437 So. 2d 719, 720 (Fla. 4th DCA 1983) (Letts, J.).

84. *Walker v. State*, 219 So. 2d 707, 708 (Fla. 2d DCA 1969) (Pierce, J.).

- Repetitive claims of prisoner are like the “proverbial brook [that] . . . continued to roll on and on.”⁸⁵
- Attorney’s arguments were unavailing because the “proverbial shoe is now on the other foot.”⁸⁶

Appellate attorneys should take heed from these examples and adequately cite relevant portions of the record. Failure to do so could result in the scorn of judges whose search for documents in an appellate record becomes “not unlike the proverbial search for a needle in a haystack.”⁸⁷

Courts recognize the gamesmanship of litigation and that attorneys sometimes attempt to catch opposing counsel off-guard with unanticipated legal arguments or maneuvers. This “gotcha” school of litigation, a phrase first coined by now Chief Judge Alan R. Schwartz of the Third District Court of Appeals, has spawned forty references in reported Florida cases.⁸⁸ Notably, most references to “gotcha” arise in cases from those parts of Florida where litigation is perceived as contentious.⁸⁹ In some instances, an attorney can be “hurled into the proverbial ‘gotcha’ position” by a court’s own ruling.⁹⁰ In contrast to the “gotcha” situation, a complacent or inefficient attorney causes problems for himself by “leaving out one nail while shoeing the proverbial horse.”⁹¹

Proverbial speech occurs frequently in dissents, perhaps because dissenting judges exercise more latitude in their literary style.⁹² For example, one dissenting judge explained that allowing white defendants to complain about state peremptory strikes against black jurors is “putting the final nail in the coffin of peremptory challenges in criminal trials.”⁹³ Another dissenting judge noted that one of the spouses in a divorce case was “guilty of fraud, deceit, duress, adultery and of perjury in lying to the trial court in the most brazen and self-serving fashion[,]” and chastised the

85. *Shoemaker v. State*, 252 So. 2d 369, 370 (Fla. 2d DCA 1971) (Pierce, C.J.).

86. *Selchow & Richter Co. v. Goldex Corp.*, 612 F. Supp. 19, 26 (S.D. Fla. 1985) (Paine, J.).

87. *Okaloosa Island Leaseholders Ass’n v. Okaloosa Island Auth.*, 308 So. 2d 120, 121 (Fla. 1st DCA 1975) (per curiam).

88. *See Salcedo v. Association Cubana, Inc.*, 368 So. 2d 1337, 1339 (Fla. 3d DCA 1979) (Schwartz, J.).

89. Of the forty cases citing proverbial “gotcha”-type tactics, thirty are from the Third and Fourth Districts, six from the First, three from the Fifth and one from the Second District.

90. *Wright v. Wright*, 509 So. 2d 329, 333 (Fla. 3d DCA 1987) (Ferguson, J., dissenting).

91. *Quick v. State*, 450 So. 2d 880, 881 (Fla. 4th DCA 1984) (Glickstein, J.).

92. In fact, eighteen of the twenty-eight occurrences of proverbial speech in United States Supreme Court opinions are in dissents. (WESTLAW search (SCT: proverb!)).

93. *Elliott v. State*, 591 So. 2d 981, 986 (Fla. 1st DCA 1991) (noting that to hold otherwise “would effectively bury the proverbial coffin” referred to in *Kibler v. State*, 546 So. 2d 710, 714 (Fla. 1989) (Ehrlich, J., dissenting)).

majority for “treat[ing] her as if she were as pure as the proverbial driven snow.”⁹⁴ Other examples include:

- “The discipline imposed [on an attorney guilty of violating Code of Professional Responsibility] is nothing more than the proverbial slap on the wrist.”⁹⁵
- The “reverberations of the civil bar’s outcry would shake the walls of the proverbial, if not actual, halls of justice.”⁹⁶
- The “majority will have created a behemoth which, like the proverbial whale when it met Jonah, will swallow the thirty-day rule.”⁹⁷
- “The majority in furtherance of a commendable social policy has thrown out the proverbial baby with the proverbial bath water.”⁹⁸

In rejecting legal arguments or rulings against parties, courts use proverbial speech to show their displeasure.

- Party’s acts “will not create a legal entity any more than a genie can be rubbed from a bottle or a proverbial silk purse be made from a sow’s ear.”⁹⁹
- “Liberty is not like the proverbial insurance policy which is often critically described as ‘the big print giveth, and the small print taketh away.’”¹⁰⁰
- Counsel’s argument is an example of “the application of the proverbial square peg to the round hole.”¹⁰¹
- A party cannot “like the proverbial chameleon, change color” and take inconsistent position.¹⁰²

94. *Schetter v. Schetter*, 279 So. 2d 58, 60 (Fla. 4th DCA 1973) (Walden, J., dissenting).

95. *Florida Bar v. Scott*, 566 So. 2d 765, 767 (Fla. 1990) (Ehrlich, J., concurring in part and dissenting in part).

96. *Martin v. State*, 515 So. 2d 189, 194 (Fla. 1987) (Ehrlich, J., dissenting).

97. *Pressley v. Wainwright*, 367 So. 2d 222, 224 (Fla. 1979) (England, C.J., dissenting) (footnotes omitted).

98. *Ingram v. Pettit*, 340 So. 2d 922, 927 (Fla. 1976) (Sunberg, J., dissenting).

99. *Daniels v. Berry*, 513 So. 2d 250, 251 (Fla. 5th DCA 1987) (Dauksch, J.).

100. *Fuller v. Wainwright*, 458 So. 2d 1131, 1132 (Fla. 4th DCA 1984) (Glickstein, J.).

101. *Bryan v. State Dep’t of Business Regulation*, 438 So. 2d 415, 420 (Fla. 1st DCA 1983) (Nimmons, J.).

102. *Stenor, Inc. v. Lester*, 58 So. 2d 673, 676 (Fla. 1951) (Hobson, J.); *Wolf v. Buchman*, 425 So. 2d 182, 185 (Fla. 3d DCA 1983) (Pearson, J.) (citing *Stenor*, 58 So. 2d at 676).

- Exercise of first amendment right to arbitrarily and unnecessarily injure another “reminds us of the proverbial bull in the china shop.”¹⁰³
- A trial involving an obviously guilty defendant who is looking for a “quirk acquittal” is the “proverbial slow plea.”¹⁰⁴
- More subtle psychological interrogation techniques have replaced the “proverbial third degree.”¹⁰⁵
- That a transaction was in fact a lottery was “clear as the proverbial ‘nose on the face[.]’”¹⁰⁶
- Court does not condone government’s explanation that the case “fell through the proverbial cracks.”¹⁰⁷

Attorneys who think that courts unfairly chide them or their clients with proverbial speech should take note. Even the Florida legislature, in “its proverbial infinite wisdom,” is occasionally taken to task as well.¹⁰⁸

II. CONCLUSION: SHOULD ATTORNEYS SPEAK PROVERBIALY?

Although far from prevalent, proverbial speech is a literary technique in Florida’s jurisprudence. The infrequency of its use may be attributed to the formality of legal opinions and misgivings about using currently fashionable phrases. The fact that courts sometimes speak proverbially may embolden attorneys wishing to exercise a well-worn cliché or two in their briefs. Legal writing experts, however, caution against the use of “those once clever phrases that have been reduced to formula.”¹⁰⁹ One expert advises that the “best way to handle clichés is not to avoid them altogether, but to use them warily” and that “[g]ood writers use clichés consciously, for a purpose.”¹¹⁰ Further, because proverbial speech is relatively rare in judicial opinions, it should likewise appear infrequently in legal briefs. Nonetheless, attorneys who adhere to the “well-known proverb ‘You never can tell till you try’”¹¹¹ might take a chance with an occasional proverb. But, they must remember that a “proverbial ‘Monday Morning Quarterback’” may be lurking out there

103. *Jane Doe v. Sarasota-Bradenton Fla. Television Co.*, 436 So. 2d 328, 330 (Fla. 2d DCA 1983) (Campbell, J.).

104. *Diaz v. State*, 567 So. 2d 18, 18 (Fla. 3d DCA 1990) (Schwartz, C.J.).

105. *State v. Sawyer*, 561 So. 2d 278, 285 (Fla. 2d DCA 1990) (Ryder, C.J.).

106. *Frye v. Taylor*, 263 So. 2d 835, 836 (Fla. 4th DCA 1972) (Mager, J.).

107. *United States v. Denson*, 668 F. Supp. 1531, 1535 (S.D. Fla. 1987) (Scott, J.).

108. *Coffey v. State*, 205 So. 2d 559 (Fla. 1st DCA 1968) (Spector, J.).

109. BRYAN A. GARNER, *THE ELEMENTS OF LEGAL STYLE* 197 (1991).

110. *Id.* at 197-98.

111. *White v. State*, 52 So. 2d 805, 808 (Fla. 1910) (Shackleford, J., dissenting).

to second-guess them.¹¹²

112. *In re Transystems, Inc.*, 569 F.2d 1364, 1371 (5th Cir. 1978) (King, D.J., sitting by designation).