

Neely, J., dissenting:

Anyone with an ounce of business experience understands that Realcorp, the appellant, is correct in this case. Here's what happened: Ms. Gillespie entered into a contract to sell a piece of property. If Ms. Gillespie had been able to sell the property for cash, she would have gotten five percent of the cash. But she couldn't sell the property for cash because there isn't much cash around. Ms. Gillespie's superior in the brokerage firm, however, managed to cut a deal by which everybody got a little bit of what he or she wanted; specifically, Ms. Gillespie ended up with thirty grand<sup>1</sup> (and that was cash). The deal having been cut, Ms. Gillespie was expected to wait until the third deed of trust was paid, and if everything had gone according to plan, Ms. Gillespie would have gotten another thirty grand. In business, we often bet on the come.

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<sup>1</sup>And that ain't hay in West Virginia!

Well . . . things didn't go according to plan and the deal turned sour. The sellers holding the second deed of trust agreed to take a deed in lieu of foreclosure, and it was only gentlemanly for the broker to give up the stone he held (to-wit, the third deed of trust) because no blood was about to be squeezed out of it.<sup>2</sup> So far, everybody behaved like a gentleman and acted as a reasonable business person. If Realcorp hadn't sued Ms. Gillespie, I would be very condemnatory and say Ms. Gillespie acted like a greedy pig and shame, shame on Ms. Gillespie. However, Ms. Gillespie's action was a counterclaim and, notwithstanding the majority treatise on procedure, this case has actually been decided under the rule that "sometimes you get the bear and sometimes the bear gets you." But for that reason the case shouldn't be taken to stand for much and has no precedential value with regard to sales commissions.

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<sup>2</sup>This is also sometimes known as "the dog in the manger rule."

<sup>3</sup>I have always thought that resorting to procedural manipulation is the last recourse of the judicial scoundrel since even the dimmest judge bulb can manipulate procedural rules to arrive at any ridiculous result. But to play the procedural game, appellant's instructions 4 and 5 are sufficiently correct that they should have been given. But even better, the jury verdict was clearly contrary to the weight of the evidence, just for a moment to take seriously articulations of standards of review.