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Doyle v. Ortega: Is Specific Performance Available for Buyers in an Earnest Money Contract?

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Doyle v. Ortega: Is Specific Performance Available for Buyers in an Earnest Money Contract?*

In a recent Idaho Supreme Court opinion, the buyers in an earnest money contract were denied the remedy of specific performance.[1] Although the stare decisis impact of this case is limited to the State of Idaho, the topic is worthy of discussion for three reasons. First, this decision has a broad effect on people, as most people enter into an earnest money contract when they are purchasing a home. Second, both contract and real estate law are areas traditionally reserved for the states. Thus, a ruling from the highest state court is the final word on the law. Finally, the opinion in *Doyle v. Ortega* lacks sufficient legal analysis and authority to support the holding. Bringing the court's errors to light could help reverse a similar holding in a future case and help other jurisdictions avoid the same pit-falls.

Part I of this note gives the background of *Doyle v. Ortega*. Part II reviews the court's analysis of the case. Part III examines the court's decision under general rules of contract law not considered by the *Doyle* court. Part IV concludes that the court erred by not granting the buyers specific performance.

I. BACKGROUND

Doyle v. Ortega considers a real estate contract between the seller, Tom Ortega, and the buyers, Patrick Doyle and Laurie Howlett-Doyle. The case presents the court with two main issues: first, whether the parties had entered into a contract; and second, if there was a contract, whether the default clause precluded the buyers from obtaining the remedy of specific performance when the seller failed to consummate the sale.[2]

 The author takes sole responsibility for the opinions and any analytical deficiencies in this note. However, I would like to thank the members of Hopkins, Roden, Crockett, Hansen & Hoopes for their inspiration. Their concern for and participation in the Idaho Falls, Idaho community was a great example for me. Thanks for teaching me that there is more to being an attorney than simply practicing law. Their genuine concern for people, their community, and their profession will influence my entire legal career. The firm's Friday morning meetings may not solve all the world's problems, but it is a good start. I would also like to thank Michelle, Elizabeth, Joshua, and Nathan for their unselfish love and support.

1. Doyle v. Ortega, 872 P.2d 721, 724 (Idaho 1994).
2. *See id.*

Tom Ortega listed real property that he owned with a broker for $32,000.[3] "Patrick Doyle and Laurie Howlett-Doyle (the Doyles) visited [this listed] property and decided to purchase it."[4] The Doyles offered $28,000 for the property by submitting an earnest money agreement, which explained the terms of their proposal.[5] Ortega rejected this offer and counter-offered to sell the property for $30,000 if the Doyles would modify four terms in their initial offer.[6] First, the down payment at closing had to be increased to $6,000.[7] Second, monthly payments had to be increased to $231.61.[8] Third, the Doyles would pay all the long-term escrow fees and the closing agent's fees.[9] Finally, the earnest money had to be deposited with a Rock Springs, Wyoming bank.[10]

Ortega's realtor prepared a new earnest money agreement. However, the realtor forgot to incorporate all of the changes discussed with Ortega before sending a copy of the new earnest money agreement to the Doyles.[11] Upon receipt of the new earnest money agreement, the Doyles signed it and returned it to their realtor.[12]

Before sending a copy of the new earnest money agreement to Ortega, Ortega's realtor realized that the wrong boxes had been marked, indicating that Ortega, not the Doyles, would be responsible for the closing costs.[13] Ortega's realtor corrected Ortega's copy of the new

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3. *Id.* at 722.

4. *Id.*

5. *Id.* The earnest money agreement was composed of a *form* real estate purchase and sale agreement and receipt for earnest money dated March 11, 1991. *See* Real Estate Purchase & Sale Agreement & Receipt for Earnest Money, RE-21, *prepared by* Ada County Association of REALTORS (Rev. 1-90) [*hereinafter* Doyles' Earnest Money Contract] (copy of the actual contract between the Doyles and Ortega, on file with the author); *cf.*, *e.g.*, Real Estate Purchase & Sales Agreement & Receipt for Earnest Money, RE-21, *prepared by* Ada County Association of REALTORS (Rev. 9-92) (the 1992 version of the earnest money prepared by the same organization that prepared the form used by the Doyles and Ortega contract); Real Estate Purchase and Sales Agreement (with Earnest Money Provision), RE-21 (Rev. 4-83) (example of another version of an earnest money contract by an unidentified drafter). The offer for $28,000 consisted of $5,600 down, then monthly payments of principal and interest for five years at $216.19, and the balance would be due in a balloon payment at the end of the five years. *Doyle*, 872 P.2d at 722.

6. *Doyle*, 872 P.2d at 722. Ortega's counteroffer is a new offer, which acted as a rejection of the Doyles' previous offer. *See* RESTATEMENT (SECOND) OF CONTRACTS § 39 (1979).

7. *Doyle*, 872 P.2d at 722.

8. *Id.*

9. *Id.* The Doyle's initial offer proposed that these fees would be shared. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* It is important to note that Ortega's realtor "marked the wrong boxes." *Id.* As with most earnest money contracts, these are standardized forms with boilerplate language which is usually not negotiated. The items usually negotiated are the price, the payment plan,

earnest money agreement to reflect that the Doyles would be responsible for closing costs as agreed. Ortega eventually signed this copy.[14]

The Doyles' realtor learned of the revisions and called Patrick Doyle, who orally agreed to all of Ortega's revisions that were not contained in their copy of the new earnest money agreement.[15] The Doyles' realtor also "prepared an addendum to the new earnest money agreement in an effort to incorporate all of the revisions."[16]

Patrick Doyle returned the signed addendum to his realtor. However, "Ortega never signed his copy of the addendum."[17] When the Doyles' demanded that Ortega consummate the sale, he refused.[18]

The Doyles brought a suit for specific performance, claiming that damages would not be sufficient since the property was unique.[19] Ortega countered that he had never entered into a contract.[20] Alternatively, if there was a contract, he claimed that the default clause in the new earnest money contract "made it clear that the Doyles' only remedy was the return of their earnest money and reimbursement for their costs."[21] Ortega based this argument on the default clause on the reverse side of the earnest money contract.[22] The default clause provided that the seller was entitled to retain the earnest money if the buyer breached, but retention of the earnest money did not waive other rights and remedies.[23] In contrast, if the seller breached, the default

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the financing, and which party is responsible for the various closing and administrative costs. *See* Doyles' Earnest Money Contract, *supra* note 5.

14. *Doyle*, 872 P.2d 722.

15. *Id.*

16. *Id.* Additionally, the addendum extended the closing date but omitted the requirement that the earnest money be transferred to the Rock Springs National Bank. The closing date was extended because "Ortega did not obtain the requisite septic tank approval from the health department until May 8, 1991. . . . The addendum omitted the requirement that the earnest money be transferred to Rock Springs because the realtor concluded that Idaho law required that the earnest money be held in trust in Idaho." *Id.* at 722-23.

17. *Id.* at 723

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *See id.* The default clause afforded the following remedies for the seller:

> S. Default: If Seller executes this agreement, and title to the subject property is marketable and insurable and the Buyer fails, neglects or refuses to comply with the terms of any conditions of sale set forth herein within five (5) days from the date on which said term or condition is to be complied with, then the earnest money, upon written request of the Seller shall be forfeited and the Buyer's interest in the property, if any, shall be terminated. The holder of the earnest money as designated herein shall pay from the earnest money forfeited by the Buyer the cost of title insurance, escrow fees, attorney's fees and any other expenses directly incurred by or on behalf of the Buyer and Seller in connection with this transaction and the remainder shall be

clause required the seller to return the buyer's earnest money.[24] The clause was silent as to whether other rights and remedies were reserved or waived.[25] Ortega essentially claimed that this silence taken with the seller's expressed reservation of rights constituted the buyers' waiver of other remedies.

After reviewing these clauses, the trial court concluded that there was insufficient evidence to prove that the liquidated damages were meant to be the exclusive remedy.[26] Therefore, the trial court granted a partial summary judgment to the Doyles for specific performance.[27] At trial, "the trial court also found that the parties had reached a meeting of the minds about all the essential terms of the sale and purchase of the property and had intended to be contractually bound."[28] The trial court granted the buyers specific performance, but the supreme court reversed that ruling.[29]

II. THE IDAHO SUPREME COURT'S ANALYSIS

In deciding whether the buyers were entitled to specific performance, the court faced two issues. First, was there a contract between the seller and the buyers?[30] If a contract did not exist, other issues, including specific performance, were moot. Second, what remedies were the buyers entitled to if the seller breached the contract? Specifically, were the buyers entitled to specific performance under this particular earnest money agreement?[31]

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apportioned one-half to the Seller and one-half to the Broker holding the earnest money, provided the amount to the Broker does not exceed the agreed commission. The payment by Broker as aforesaid *shall not constitute a waiver of any other rights or remedies available to the Seller and/or Broker*. Buyer shall be responsible for any and all costs or fees incurred by or on behalf of the Buyer.

Id. (emphasis added).

24. *Id.* If the seller breached the contract, the contract provided the following remedies for the buyer:

> If the Seller, having approved said sale fails to consummate the same as herein agreed, the Earnest Money shall be returned to the Buyer less such charges and other costs or fees incurred or committed for use by or on behalf of the Buyer hereunder and Seller shall pay for the cost of title insurance, escrow and legal fees, if any, and reimburse Buyer for that portion of the Earnest Money expended or committed on behalf of the Buyer which cannot be refunded.

Id.

25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 723-24.
31. *Id.* at 724.

A. The Court's Analysis of Whether a Contract Existed

The supreme court's analysis of whether a contract existed was very brief. To reverse the trial court's decision, the seller, Ortega, had to establish that the trial court's decision was not supported by substantial evidence or, in other words, was "clearly erroneous."[32] This standard of review required Ortega to show that there was no "substantial and competent evidence to support the trial court's findings."[33]

After reviewing the facts, the supreme court held that there was substantial and competent evidence to support the trial court's findings.[34] Only the contract term requiring the earnest money to be placed with a bank in Rock Springs was at issue because the money had never been placed there.[35] However, the court held that placing the earnest money in a particular bank in Rock Springs was inconsequential in deciding whether the parties had a meeting of the minds.[36]

B. The Court's Analysis of Specific Performance

Before addressing the issue of specific performance, the court addressed its standard of review for contracts. The standard of review was contingent upon whether the contract was ambiguous.[37] If the contract was held ambiguous, its interpretation would be a question of fact. If the contract was not ambiguous, its interpretation would be a question of law over which the court could exercise free review.[38] The

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32. *See id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* A violation of the statute of frauds was the only other argument questioning whether there was a contract between Ortega and the Doyles. This issue arose because land transfers of real property must be in writing, and Patrick Doyle at one point orally agreed to the changes of Ortega. *Compare id.* at 722 *with* IDAHO CODE § 9-503 (1990) (discussion and law regarding the Statute of Frauds). However, neither the trial court nor the supreme court allowed this argument since Ortega did not bring the issue up in his pleadings. *Doyle*, 872 P.2d at 724. Under the Idaho Rules of Civil Procedure, if the statue of frauds is not raised as an affirmative defense, it is waived. *See id* at 724 (citing IDAHO R. CIV. P. 8(c) (1994)).

37. If the contract is ambiguous, the question of the parties' intent is a factual question where deference is given to the trial court, *see Doyle*, 872 P.2d at 724, and the standard of review is clearly erroneous. IDAHO R. CIV. P. 52(a) (1994). If the contract is not ambiguous, the court can interpret the contract as a matter of law.

38. *See Doyle*, 872 P.2d at 724 (quoting Bondy v. Levy, 829 P.2d 1342, 1345-46 (Idaho 1992)) (stating that free review is the same standard as de novo review); *see also* Robert M. Tyler, Jr., *Practices and Strategies for a Successful Appeal*, 16 AM. J. TRIAL ADVOC. 617, 618 (1993).

According to the court, the rules regarding the review of contracts were well established:

supreme court held that the default clause in the earnest money contract was not ambiguous.[39] The court then, using the standard of free review, reversed the trial court's holding and concluded that the default clause limited the buyer to the remedy stated in the contract.[40] This conclusion was based on two factors. First, the court compared the seller's default clause to the buyers'. The seller's default clause provided for retention of the earnest money by the seller and broker upon the buyers' default and did not waive "any other rights or remedies available."[41] Conversely, the buyers' default clause made no such reservation, so the court concluded that other remedies were precluded and the buyers were limited to the return of their earnest money.[42]

Second, the supreme court held that returning the earnest money was "inconsistent with specific performance." However, the court never explained this inconsistency.[43] Apparently, these remedies are inconsistent because returning the earnest money means canceling the deal while specific performance means consummating it. This or some other difference not expressed persuaded the court that allowing both remedies would unjustly enrich the buyers.

The court supported its denial of specific performance with *Margaret H. Wayne Trust v. Lipsky*.[44] In *Lipsky* the contract contained a liquidat-

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> The primary objective in construing a contract is to discover the intent of the parties, and in order to effectuate this objective, the contract must be viewed as a whole and considered in its entirety. The primary consideration in interpreting an ambiguous contract is to determine the intent of the parties. The determination of the contract's meaning and legal effect are questions of law to be decided by the court where the contract is clear and unambiguous. However, where the Contract is determined to be ambiguous, the interpretation of the document presents a question of fact which focuses upon the intent of the parties. The determination of whether a contract is ambiguous or not is a question of law over which we may exercise free review, and in determining whether a contract is ambiguous, our task is to ascertain whether the contract is reasonably subject to conflicting interpretation.

Doyle, 872 P.2d at 724. (quoting Bond v. Levy, 829 P.2d 1342, 1344-46 (Idaho 1992)).

39. *Doyle*, 872 P.2d at 724.

40. *Id.* at 725. The buyers' remedy under the default clause is as follows:

> If the Seller, having approved said sale fails to consummate the same as herein agreed, the Earnest Money shall be returned to the Buyer less such charges and other costs or fees incurred or committed for use by or on behalf of the Buyer hereunder and Seller shall pay for the cost of title insurance, escrow and legal fees, if any, and reimburse Buyer for that portion of the Earnest Money expended or committed on behalf of Buyer which cannot be refunded.

Id. at 723.

41. *Id.*

42. *Id.* at 723-25.

43. *Id.* at 724-25.

44. *Id.* at 725 (citing Margaret H. Wayne Trust v. Lipsky, 846 P.2d 904, 908-09 (Idaho 1993)).

ed damages clause with a reservation of other remedies for *both* the buyer and the seller.[45] Although the supreme court in *Lipsky* found that the seller had the right to specific performance because of the reservation, it stated that "[t]his is not to say, however, that an agreement for the purchase of real property may not be clearly drafted so as to limit the seller's remedy to retaining the earnest money deposit as liquidated damages."[46] The *Doyle* court did not explain the significance of the *Lipsky* case. It only noted that both the buyer and the seller in *Lipsky* had a reservation of "other remedies" in the default clause,[47] which implicitly included the right of specific performance.

Additionally, the supreme court ignored significant differences between the two cases. In contrast to the earnest contract in *Lipsky*, the earnest money contract in *Doyle* expressly reserved "other rights" to the seller but not to the buyers.[48] Therefore, the court held that the buyers were not entitled to any rights other than those expressed in the default clause; specifically, the buyers were limited to the return of their earnest money.[49] Thus, the *Doyle* court's holding implied that the earnest money contract was so clearly drafted that it limited the buyer to the remedies expressed in the contract.[50] Implicitly, the supreme court declared that if a party does not reserve "other rights" in the contract, a party is limited to those remedies expressed in the contract.

III. Analysis of the Court's Opinion

On the surface, the court's conclusion that the buyer is not entitled to specific performance appears reasonable. However, upon careful examination it is apparent that the court skipped some fundamental steps of analysis and ignored several basic rules of interpreting contracts. This note focuses on four weaknesses in the *Doyle* opinion: (1) the lack of authority and flawed reasoning; (2) contract interpretation in favor of the drafter; (3) the court's failure to interpret the contract according to form contract rules; and (4) the inequity resulting from the opinion. The court could have arrived at a different conclusion by correctly dealing with any of these four factors. Taken together, these weaknesses in the *Doyle* opinion clearly indicate that the court reached the wrong result.

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45. *Lipsky*, 846 P.2d at 908-09.
46. *Id.* at 909; *see also Doyle*, 872 P.2d at 725.
47. *Doyle*, 872 P.2d at 725.
48. *See id.* at 723.
49. *Id.* at 725.
50. *See id.* at 724-25.

A. Lack of Authority and Reasoning Flaws in the Doyle *Opinion*

1. Insufficient authority to support its holding

The only authority cited by the supreme court to support its denial of the buyers' request for specific performance is *Margaret H. Wayne Trust v. Lipsky*.[51] *Lipsky* stated in dicta that a purchase agreement may be clearly drafted so as to limit the seller's remedy to the liquidated damages.[52] However, a few key points distinguish *Lipsky* from *Doyle*. First, *Lipsky* actually held that the liquidated damages clause or default clause *did not limit* the seller's remedies, which is the opposite holding of the *Doyle* opinion.[53] Second, *Lipsky* focused on the seller's remedies, whereas *Doyle* focused on the buyer's remedies.[54] This is significant because the buyer of the land has a stronger argument for specific performance than the seller since land is unique.[55] Additionally, in *Doyle* the buyers were the nondrafters[56] while in *Lipsky* the seller drafted the agreement.[57] Third, the dicta that the court relied upon in *Lipsky* requires a limitation of remedies to be clearly drafted in the agreement.[58] When applying the clearly-drafted requirement to the facts in *Doyle*, it is doubtful whether failing to reserve "other rights" for one party in a nonnegotiated clause passes the clearly-drafted test. Fourth, *Lipsky* creates a presumption that a party has a choice of remedies unless there is evidence to the contrary. This presumption is found in the *Lipsky* court's citation of Professor Dobbs' treatise on damages:

> The presence of a liquidated damages provision does not automatically prevent the vendor from claiming his actual damages, and in the absence of any indication to the contrary, *it probably should be assumed that the vendor is free to claim liquidated or actual damages, at his option.*[59]

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51. *Id.* at 725 (citing Margaret H. Wayne Trust v. Lipsky, 846 P.2d 904 (Idaho 1993)).

52. *Id.*; *cf.* ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY, § 10.5 (1984) ("[A] liquidated damages clause may be construed to exclude other remedies such as specific performance; likewise, a clause in the contract may expressly deny specific performance.")

53. *Lipsky*, 846 P.2d at 904.

54. *See infra* note 120 and accompanying text (discussing the difference between the buyer's and seller's right to specific performance).

55. *See infra* note 120.

56. *See infra* part III.B.

57. *Lipsky*, 846 P.2d at 906. The seller in *Lipsky* was the drafting party because her form contract was used. *Id.*; *see infra* part III.C.

58. *Doyle*, 872 P.2d at 725; *Lipsky*, 846 P.2d at 909.

59. *Lipsky*, 846 P.2d at 909 (citing DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 12.11 (2d ed. 1993)) (emphasis added).

Thus, rather than supporting the *Doyle* opinion, *Lipsky*'s reference to Professor Dobbs sets up a rebuttable presumption for the *Doyle* court to overcome. Apparently, the *Doyle* court believed evidence existed in the default clause to limit the buyers' remedies. However, neither the *Lipsky* court nor the *Doyle* court ever directly addressed whether failure to reserve remedies for only one party, the nondrafting buyers in the *Doyle* case, is sufficient to overcome the Dobbs presumption.

In summary, only dicta in *Lipsky* supports the *Doyle* court's conclusion. The facts are easily distinguishable, and the clearly-drafted standard is only supported by the buyer's silence. Furthermore, *Lipsky* presumes that rights are not waived. This presumption actually supports the buyers' position, which would entitle them to specific performance.

2. *Using the wrong standard of review and overlooking factual ambiguities*

The court made another mistake in determining the standard of review. The court held, without any analysis, that the contract was not subject to any reasonably conflicting interpretations; thus it could interpret the contract as a matter of law under the standard of free review.[60] However, when concluding that the contract was not subject to reasonably conflicting interpretations, the court never considered alternative interpretations of the default clause. The absence of such discussion and the court's conclusory analysis cause one to wonder if any consideration was given to alternative interpretations.

The contract was silent as to whether the buyers had any remedies in addition to the return of their earnest money. This silence could have been interpreted in at least three different ways: (1) the silence clearly indicated that the parties did not intend specific performance as buyers' remedy, (2) the silence created ambiguity, or (3) the silence clearly did not state a waiver of the buyers right to specific performance.

The court's interpretation was that the contract's silence concerning remedies clearly indicated that the parties did not intend specific performance as a remedy for the buyers.[61] The buyers were therefore limited to the return of their earnest money because that was the only remedy stated in the default clause.[62]

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60. Under the free review standard, the supreme court could review the trial court record and contract de novo. *See* Tyler, *supra* note 38 (stating that free review and de novo review are the same standard).

61. *Doyle*, 872 P.2d at 724-25.

62. *Id.*

The court could have found that the contract's silence created ambiguity as to whether the buyers gave up their right to specific performance. Since this was a form contract, the parties neither considered nor negotiated the terms of the default clause so one must consider the parties' intent.[63] The parties' intent is a factual question, requiring greater deference to the trial court's decision.[64] Additionally, as a factual question, the parties' intent would not be subject to free review.[65]

The court might also have found that, in light of the contract's silence on buyers' remedies, the contract did not clearly state a waiver of the buyers right to specific performance.[66] Because the contract did not clearly state that the buyers gave up their right to specific performance, they are still entitled to that remedy.[67] No language in the earnest money's default clause nor any extrinsic evidence indicated that the buyers intended to waive other remedies. The liquidation clause could have been a floor for damages rather than a ceiling as the court interpreted it.[68] Thus, by interpreting the contract as a matter of law under the free review standard, the court could have easily found that the buyers were entitled to specific performance.

The important point is not which interpretation above is correct, but rather that these three viable, conflicting interpretations create a factual issue about intent that precludes free review.[69] Since the *Doyle* opinion only mentions the first alternative, whether the other interpretations were even considered is uncertain. These other reasonable interpretations created an issue of fact, which could only be resolved by looking at the parties' intent. Because the parties' intent is a factual question,[70] the supreme court could have only overturned the trial court's decision[71] if the decision was clearly erroneous.[72] Under the higher standard of clearly erroneous, the *Doyle* court would have been obligated to uphold

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63. *See infra* part III.C.

64. Rutter v. McLaughlin, 612 P.2d 135, 136 (Idaho 1980).

65. *See Doyle*, 872 P.2d at 724.

66. This interpretation is opposite of that used by the *Doyle* court.

67. *See* discussion of waivers *infra* part III.A.3.

68. *See* DOBBS, *supra* note 59 § 12.9(5).

69. *See* DeLancey v. DeLancey, 714 P.2d 32, 34 (Idaho 1986); Rutter v. McLaughlin, 612 P.2d 135, 136 (Idaho 1980).

70. Ada County Assessor v. Taylor, 861 P.2d 1215, 1218-19 (Idaho 1993); Hilt v. Draper, 836 P.2d 558, 563 (Idaho. Ct. App. 1992).

71. The trial court held that there was insufficient evidence to support the claim that the liquidated damages clause was intended to be the buyers' exclusive remedy. Doyle v. Ortega, 872 P.2d 721, 723 (Idaho 1994).

72. *Rutter*, 612 P.2d at 136.

the trial court's decision,[73] which granted specific performance of the contract. Thus, by overlooking other reasonable, conflicting interpretations, the supreme court used the wrong standard of review to reach the wrong result.

3. *Inconsistency with the waiver of rights*

The court's holding is inconsistent with the equitable doctrine of waiver in three ways. First, a waiver is ordinarily a question of fact that the trier of fact decides.[74] Second, there was no expressed waiver of right and the high standard for an implied waiver was not met. Third, a person with unclean hands cannot ask for an equitable remedy such as a waiver.

First, using the free review standard for a waiver is erroneous since "the existence of [a] waiver ordinarily is a question of fact, and if there is any substantial evidence in the record to support a waiver, it is for the trier of fact to determine whether the evidence establishes such a waiver."[75] In trying to overcome the trial court's factual finding, the supreme court erroneously disregarded the findings of the trial court, the fact finder,[76] and interpreted a factual issue as a matter of law. Although the court could argue that interpreting an unambiguous contract was a matter of law,[77] the existence of a waiver of remedies, based on the buyers' omission, was a question of fact.

Second, the *Doyle* opinion did not present evidence to support an expressed or implied waiver of the buyers' equitable right to specific performance. The court in *Doyle* inferred that since the seller reserved rights other than the liquidated damages clause and the buyer did not, the buyer was not entitled to any other remedy. This reasoning goes against the general rule that a waiver of rights requires an "intentional relinquishment of a known right."[78] The opinion cited no expressions by the

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73. The supreme court will uphold a trial court's decision as long as there is substantial competent evidence to support that decision. *Doyle*, 872 P.2d at 724. The trial court claimed there was insufficient evidence to support the seller's claim that returning the buyers' earnest money was the exclusive remedy. *Id.* Thus, the supreme court could only reverse the trial court's factual finding by showing in the record that the parties intended to make the return of the buyers' earnest money the exclusive remedy. Since the facts do not warrant such a finding, the supreme court had no basis to overturn the trial court.

74. Medical Services Group v. Boise Lodge No. 310, Benevolent and Protective Order of Elks, 878 P.2d 789, 793 (Idaho Ct. App. 1994).

75. *Id.*

76. *Doyle*, 872 P.2d at 723-25.

77. *Id.* at 724.

78. Margaret H. Wayne Trust v. Lipsky, 846 P.2d 904, 907 (Idaho 1993); *see also* Brand S. Corp. v. King, 639 P.2d 429, 432 (Idaho 1981); DOBBS, *supra* note 59 § 2.3(5) ("Waiver is an intentional, voluntary, and understanding relinquishment of a known right.").

Doyles indicating they intended to relinquish or waive their right to specific performance.

In *Lipsky*, the court held that "[t]o establish a waiver, the intention to waive must clearly appear."[79] A waiver was not clearly apparent in the Doyles' contract. *Lipsky* also stated that a "[w]aiver will not be inferred except from a clear and unequivocal act manifesting an intent to waive or from conduct amounting to estoppel."[80] Moreover, *Lipsky* gave the task of weighing conflicting evidence in order to determine the existence of a waiver to the *trial court*.[81] Further, the trial court's findings should not be overturned on appeal unless there is a lack of substantial and competent evidence to support its findings.[82]

Without an expressed waiver, the supreme court needed to justify its position through an implied waiver. Generally, an "implied waiver consists of two elements: (1) reliance by the party seeking to assert a waiver; and (2) direct and unequivocal conduct indicating a waiver."[83] However, the facts do not sustain either prong of this test. Although implied waiver is possible under Idaho law, proving it requires a high standard of proof with the burden of proof on the party asserting the waiver.

The problem for the seller in *Doyle* is that the evidence is insufficient to meet the burden of proof for an implied waiver.[84] No facts establish direct or unequivocal conduct by the Doyles indicating they intended to give up their right to specific performance. Nor was there evidence that Ortega, the seller, relied on the limitation of the buyers' remedy in the default clause of the contract. The bottom line is that Ortega simply did not meet the test for an implied waiver. Since the seller did not meet the threshold test for an implied waiver and since the contract did not contain an express waiver, the Doyles should have been entitled to specific performance.

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79. *Lipsky*, 846 P.2d at 907. *See* Riverside Development Co. v. Ritchie, 650 P.2d 657, 662 (Idaho 1982).

80. *Lipsky*, 846 P.2d at 907; Soloaga v. Bannock County, 809 P.2d 1157, 1161 (Idaho Ct. App. 1990); Jones v. Maestas, 696 P.2d 920, 922 (Idaho Ct. App. 1985).

81. *Lipsky*, 846 P.2d at 907.

82. *See id.* at 907-08; Price v. Aztec Limited, Inc., 701 P.2d 294, 298 (Idaho Ct. App. 1985); *see also* IDAHO R. CIV. P. 52(a) (1994) (indicating that a finding of facts shall not be set aside unless clearly erroneous).

83. Idaho Migrant Council, Inc. v. Northwestern Mutual Life Ins. Co., 718 P.2d 1242, 1244 (Idaho Ct. App. 1986).

84. This may be why the trial court held there was insufficient evidence to prove that the buyers intended to give up their right to specific performance. *See Doyle*, 872 P.2d at 723.

Third, a person with unclean hands cannot seek a remedy in equity.[85] Waiver is an equitable doctrine.[86] As an equitable remedy, a waiver should not be granted haphazardly, especially in the form contract setting to the breaching party. In *Doyle*, the seller, who breached the contract, essentially asked the court to interpret the buyers' silence as a waiver of rights.[87] Contrary to the clean hands doctrine, the court waived the buyers' rights to specific performance by granting equity to the breaching party.[88]

4. Returning the buyers' earnest money is not inconsistent with specific performance

Returning the buyers' earnest money is not inconsistent with specific performance as the supreme court claimed. Presumably, if the buyers were entitled to both specific performance and return of their earnest money, the court felt the buyers would be unjustly enriched. The default clause stated that if the seller defaulted, "the earnest money *shall* be returned to the buyer."[89] However, even if the buyers were entitled to specific performance and return of their earnest money, they would not be unjustly enriched. The following hypothetical situation illustrates this point:

Assume the terms of the contract are as follows (1) earnest money paid is $1,000, (2) sale price of the property is $30,000, and (3) other costs are $500 and are the responsibility of the buyer to pay. Other costs could be paid out of the earnest money during the final closing settlement.

If the buyers' remedy is limited to specific performance of the contract, they are required to pay the seller $29,500 as stipulated by the contract. The total cost of the property is $30,500 ($30,000 sale price plus $500 for other costs). After subtracting the credit for the earnest money, the amount owed is $29,500. Of the $1,000 of the earnest money, $500 will be applied to the downpayment and the other $500 will be used to pay for the buyers' other costs. The gross cost to the buyers is $30,500 and the net proceeds to the sellers is $30,000.

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85. Hoopes v. Hoopes, 861 P.2d 88, 92 (Idaho Ct. App. 1993) ("[H]e who comes in equity must come with clean hands," and a party can be denied relief in an equity court if "his conduct has been inequitable, unfair and dishonest, or fraudulent."). However, the clean hands doctrine is not a straight jacket for a court. *Id.* The court should focus on conduct not motives. *Id.*

86. *See Idaho Migrant Council*, 718 P.2d at 1244.

87. *See Doyle*, 872 P.2d at 722-25.

88. *Id.*

89. *Id.* at 723 (emphasis added) (quoting the earnest money contract between the Doyles and Ortega).

If the buyers were entitled to both the return of their earnest money under the default clause and specific performance, the result is the same as if the buyers were limited to specific performance. Assuming that all closing costs have already been paid out of the earnest money, the seller will have to return the $500 of remaining earnest money and give the buyer $500 out of his own pocket, which was taken from the earnest money to cover other costs. When the contract is specifically enforced, the buyer will have to pay the full price for the property, $30,000. The buyers, under the terms of the contract, will also have to pay the other costs of $500. However, since the seller has already paid this $500, the seller would be entitled to reimbursement. The seller will have paid $500 out-of-pocket and then will have been reimbursed. Again, the gross cost to the buyers is $30,500 and the net proceeds to sellers is $30,000. This illustration demonstrates that the default clause remedy and specific performance are not inconsistent with each other since the buyer was not unjustly enriched and both transactions lead to the same result.

B. Contract Interpretation in Favor of the Drafter

Besides the reasoning errors and lack of authority, the *Doyle* opinion violated a basic rule of contract construction by interpreting the earnest money contract in favor of the drafter. This is contrary to the longstanding rule that contracts are to be interpreted against the drafter.[90] In *Doyle*, the first form was prepared by the buyers, but this was rejected by the seller.[91] The seller then had his realtor draw up a new contract,[92] a counteroffer.[93] This new offer was accepted by the buyers.[94] To clarify confusion about the contract terms,[95] the buyers' broker drew up an addendum to the seller's contract to summarize all the

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90. *See* USA Fertilizer, Inc. v. Idaho First National Bank, 815 P.2d 469, 472 (Idaho Ct. App. 1991); Luzar v. Western Surety Co., 692 P.2d 337, 341 (Idaho 1984); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 206 (1979) ("In choosing among the reasonable meanings of a promise or agreement or a *term thereof*, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.") (emphasis added); CUNNINGHAM, *supra* note 52, § 10.4 ("Courts often enforce forfeiture-of-deposit clauses only grudgingly. Since they are obviously designed to protect the vendor, they are construed against him in cases of ambiguity.").

91. *Doyle*, 872 P.2d at 722.

92. *See id.*

93. *See* RESTATEMENT (SECOND) OF CONTRACTS § 39 (1979). Since the seller's realtor used a standardized form, drawing up the contract consisted of filling in the spaces reserved for negotiable terms. The liquidation clause was just boilerplate on the reverse side of the contract. *See* Doyles' Earnest Money Contract, *supra* note 5.

94. *See Doyle*, 872 P.2d at 722.

95. None of the clarification related to default clause, *id.*, which was in small print on the reverse side of the seller's form. *See* Doyles' Earnest Money Contract, *supra* note 5. The negotiation and clarification related to terms on the front side of the form.

changes.[96] However, the important point is that the seller's earnest money contract form was used, and the court interpreted the contract in the seller's favor.

Arguably, the court could opine that this rule of contract construction only applies if the contract is subject to reasonably conflicting interpretations.[97] Since the court held that the contract was not ambiguous,[98] the rule of interpreting a contract in favor of the nondrafter was a moot issue.

However, in deciding whether the contract is ambiguous, the court gave very little weight to the possibility that the contract might be subject to reasonably conflicting interpretations.[99] As discussed above,[100] the contract was subject to reasonably conflicting interpretations and thus should have been considered ambiguous. When such an ambiguity exists, the interpretation should favor the nondrafting party, which in this case was the buyer.[101]

C. Failure to Conform to Form Contract Rules

From the court's opinion, it appears that the court treated the default clause as if it were a negotiated part of the contract; however, this interpretation is not supported by the facts.[102] Rather, the default clause was just boilerplate language.[103]

It is likely that neither party fully understood the extent of their rights under the default clause. The default clause in *Doyle* was a standard RE 21 earnest money contract, a form contract prepared by the realty community.[104] As with all liquidated damages clauses, the

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96. *Doyle*, 872 P.2d at 722-23.

97. *See* Suchan v. Suchan, 741 P.2d 1289, 1295 (Idaho 1987); USA Fertilizer Inc. v. First Nat'l Bank, 815 P.2d 469 (Idaho Ct. App. 1991).

98. *Doyle*, 872 P.2d at 724.

99. *See supra* Part III.A.2.

100. *Id.*

101. *See USA Fertilizer*, 815 P.2d at 472; Luzar v. Western Surety Co., 692 P.2d 337, 341 (Idaho 1984); *See also* RESTATEMENT (SECOND) OF CONTRACTS § 206 (1979) ("In choosing among the reasonable meanings of a promise or agreement or a *term thereof*, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.") (emphasis added); CUNNINGHAM, *supra* note 52, § 10.4 ("Courts often enforce forfeiture-of-deposit clauses only grudgingly. Since they are obviously designed to protect the vendor, they are construed against him in cases of ambiguity.").

102. *See Doyle*, 872 P.2d at 722-24.

103. *See, e.g.*, Margaret H. Wayne Trust v. Lipsky, 846 P.2d 904, 906 (Idaho 1993) (earnest money contract was on "a standard printed real estate purchase and sales agreement" prepared by the seller); earnest money contracts listed in *supra* note 5.

104. *See* Doyles' Earnest Money Contract, *supra* note 5. All three of earnest money contracts listed in *supra* note 5 have the default clause printed in small print on the reverse side of the contract with no space provided for modification.

weight given to them should be based on how large a part they played in the negotiation process.[105] The facts do not suggest that the parties even read or considered the clauses in their negotiations.[106]

The *Doyle* earnest money contract illustrates the difficulty of negotiating remedies in a form contract setting. The important negotiable factors are found on the front side of a standardized carbon copy form.[107] Such terms include the price and identify which party will pay the various costs associated with the transaction.[108] When a price is marked on the standard form, it is carbon copied to the broker's and buyer's copies. However, the default clause is on the reverse side of the form.[109] Any changes to the default clause cannot be carbon copied to other copies of the agreement.[110] In other words, it would take a sophisticated buyer making an extra effort in order to modify the default clause. Additionally, the standard forms were prepared by the realty community,[111] which is more significantly influenced by sellers and brokers than by buyers.[112]

The general rule regarding form contracts is that terms are considered part of an integrated agreement unless the party drafting the contract (the seller) has reason to believe that the other party (the buyer) would not have consented to the terms.[113] The issue the court should have addressed is whether the buyers would have agreed to the default clause if they knew they were not entitled to specific performance. This question was not addressed by the court and cannot be answered from the facts in the opinion.

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105. *See* Jeffrey B. Coopersmith, *Refocusing Liquidated Damages Law for Real Estate Contracts: Returning to the Historical Roots of the Penalty Doctrine*, 39 EMORY L.J. 267, 298 (1990); *cf.* Elizabeth Warren, *Formal and Operative Rules Under Common Law and Code*, 30 U.C.L.A. L. REV. 898, 916 (1983) (underliquidated damages clause present opportunity for abuse partially because courts assume that they have been fairly negotiated).

106. *See Doyle*, 872 P.2d at 722-24.

107. *See* Doyles' Earnest Money Contract, *supra* note 5.

108. *Id.*

109. *See supra* note 5 and accompanying text (citing to a copy of the earnest money contract between the Doyles and Ortega as well as other copies of standardized earnest money contracts).

110. *Id.*

111. *Id.*

112. This explains why the earnest money was split equally between the broker and seller if the buyer defaulted as well as why retention of the earnest money did "not constitute a waiver of any other rights or remedies" for the seller or broker. *Doyle*, 872 P.2d at 723.

113. *See* RESTATEMENT (SECOND) OF CONTRACTS § 211 (1979).

D. Inequity Resulting From the Doyle *Opinion*

1. Historical background of specific performance

Equitable remedies like specific performance were developed to grant relief for the sometimes harsh and inadequate results of legal remedies.[114] For example, remedies at law could only provide damages (monetary compensation) when a party breached a contract, but could not demand performance under the contract.[115] However, a court of equity could order specific performance if the remedy at law (damages) was inadequate.[116] Although Idaho, like many other states, has abolished the distinction between courts of equity and courts at law,[117] many of the rules associated with courts of equity and courts at law still apply. For example, a party is not entitled to an equitable remedy for breach of contract in Idaho unless the remedy at law is inadequate.[118] In contract settings, damages often suffice since a party may be able to obtain substitute performance. This is particularly true if the contract is for the sale of goods. However, if the contract involves the sale of land, damages may not be adequate because each parcel of land is thought to be unique in character.[119] Thus, the nonbreaching party of a contract to sell land is usually entitled to specific performance because of the unique character of the land.[120]

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114. *See generally* CUNNINGHAM, *supra* note 52, §10.5.

115. Suchan v. Rutherford, 410 P.2d 434, 436-438, 441 (Idaho 1966).

116. *Id.*; *see also* JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS, § 16-2 (1987) ("[E]very interest in land was unique. Consequently, the remedy of damages for breach of a contract to convey an interest in land was deemed inadequate."); CUNNINGHAM, *supra* note 52, §10.5 ("[S]pecific performance should be ordered only when the remedy at law is inadequate. . . . [e]ach parcel of land is unique. . . . Hence, damages are inadequate per se.").

117. IDAHO CONST. art. 5, § 1 ("The distinctions between actions at law and suits in equity, and the forms of all such actions and suits, are hereby prohibited; and there shall be in this state but one form of action for the enforcement or protection of private rights or the redress of private wrongs, which shall be denominated a civil action."); *see* Village of Peck v. Denison, 450 P.2d 310, 316 (Idaho 1969) (McFadden, J., concurring in part and dissenting in part).

118. *See* Holscher v. James, 860 P.2d 646, 650 (Idaho 1993); CUNNINGHAM, *supra* note 52, §10.5 ("[S]pecific performance should be ordered only when the remedy at law is inadequate").

119. *See* Hancock v. Dusenberry, 715 P.2d 360, 365 (Idaho Ct. App. 1986); CUNNINGHAM, *supra* note 52, §10.5 ("[E]ach parcel of land is unique. . . . Hence, damages are inadequate per se.").

120. It is thought that substitute performance or damages are inadequate since no two pieces of land are alike. *See* Suchan v. Rutherford, 410 P.2d 434, 438-39 (Idaho 1966). Thus, specific performance may be the only way to compensate the nonbreaching party in a contact for the sale of land. This philosophy is probably more true for the buyer than the seller. *See*

2. Fundamental unfairness in the result

Although the contract between the Doyles and Ortega probably did not reach the level of being unconscionable,[121] under the court's interpretation of the contract, the remedies available to the buyer are significantly reduced in comparison to those available to the seller. At one time the courts required a mutuality of remedies.[122] Although a mutuality of remedies is no longer required,[123] it is still a factor when accompanied by other reasons.[124] Given all the other reasons discussed above,[125] the court should have considered the disparity in remedies resulting from its interpretation.

The result of the *Doyle* opinion is that the seller is entitled to liquidated damages, but is not precluded from other damages if the buyer breaches. This means the seller could also argue for "reliance damages," "restitution damages," or "expectation damages."[126] In contrast, the buyers are limited to liquidated damages, which puts them in the same position as if they had never made the contract. Essentially, the court's holding precludes them from their bargained-for expectations.

To better understand the difference between the buyers' and the seller's positions, consider the following hypothetical based on the court's interpretation of the default clause at issue in *Doyle*:

The purchase price is $30,000, and the buyer puts down earnest money of $1,000. However, after the earnest money contract is signed by both parties, the land decreases in value to $20,000. The buyer breaches hoping only to lose only the earnest money invested.

CUNNINGHAM, *supra* note 52, § 10.5. If the seller breaches, then the buyer loses the opportunity to buy that particular parcel with its unique characteristics. Money damages may allow the buyer to purchase another parcel of land, but the parcel will be different in some respects. *Id.*

Conversely, if the buyer breaches, the seller may also be entitled to specific performance. However, the equitable importance may not be as strong. *See id.* If the seller receives money damages for differences between the market price and out-of-pocket expenses associated with finding and selling to a new buyer, then the non-breaching seller has been made whole without the need for specific performance. Thus, the remedy at law is an adequate form of damages. The unique character of the land is not as important to the seller since his or her interest is in the price not the land itself. The price does not have unique characteristics like the parcel of land. Nevertheless, courts continue to grant sellers specific performance. *See id*; *see also* Margaret H. Wayne Trust v. Lipsky, 846 P.2d 904, 908-09 (Idaho 1993).

121. *See generally* Smith v. Idaho State University, 760 P.2d 19, 23-24 (Idaho 1988) (applying the unconscionability doctrine).

122. *Suchan*, 410 P.2d at 439-40.

123. *See id.*; CALAMARI, *supra* note 116, § 16-6; CUNNINGHAM, *supra* note 52, § 10.5.

124. *Suchan*, 410 P.2d at 439.

125. *See supra* Part III.A, B, C.

126. *See* RESTATEMENT (SECOND) OF CONTRACTS § 344 (1979).

Under such a scenario, the $1,000 would be applied first to certain costs associated with the transaction, and then would be split evenly between the broker and the seller.[127] Assuming no costs, the seller would get $500, one-half of the earnest money. Additionally, the seller could bring an action for the other $9,500 for the lost benefit of his bargain, expectation damages. Alternatively, the seller could seek specific performance, again expectation damages.

Conversely, if the seller breaches the contract, the buyers have the right to have the full amount of their earnest money returned. If some of the earnest money has been applied toward costs related to the transaction, the seller is required to make up the difference.[128] Essentially, the buyers are put back in the same position as if the deal had never been made and are denied the benefit of their bargain. If the property had increased in price to $45,000, the buyers would not get damages for the $15,000 increase but would simply have their $1,000 of earnest money returned.

The disparity of remedies created under the *Doyle* opinion allows the seller to enforce the contract if property values decline or default and sell the property for a higher price if property values rise. Essentially, the contract allows the seller to speculate while binding the buyer to the contract. This result could be equitable if the parties had intended to be bound by such a bargain, but the result should not stem from one party's silence.

3. *Other issues related to liquidated damages clauses*

In reaching its decision, the court seemed to have forgotten some basic reasons for liquidated damage clauses. Damages for breaches are often difficult to measure and prove, so parties create liquidated damages clauses to measure what they expect the damages to be.[129] Courts have held such clauses unenforceable if they are found to be a penalty or if they are too far removed from the actual damages.[130]

Public policy reasons for upholding liquidated damage clauses do not apply to specific performance for two reasons. First, there is no need to measure the damages since specific performance is literally the enforce-

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127. *See* discussion of default clause *supra* part II. B.

128. *Id.*

129. *See* ULTA § 2-516 (1975). This section also states that "[a] party entitled to recover under a valid liquidated-damages clause has no other remedy for any breach to which the liquidated-damages clause applies unless other remedies are expressly reserved in the contract" *Id.* § 2-516(b). However, this position depends upon the clause being an exclusive liquidation clause, which is dependant upon the parties negotiations and expressions. *See* DOBBS, *supra* note 59, § 12.9(5).

130. *See* DOBBS, *supra* note 59, § 12.9(5).

ment of the parties' actual bargain. Other than incidental costs or time delays associated with enforcing the contract, specific performance equals actual damages. For example, if the land value increases from $30,000 to $45,000 and the seller breaches, an action for damages could be brought for $15,000. If specific performance is the remedy, then the buyer would get a parcel of land worth $45,000 for the cost $30,000. Both actions yield the same result. Second, specific performance cannot be a penalty. Penalties in liquidated damage clauses occur when the liquidated damages unreasonably exceed the actual damages. Specific performance can not exceed the actual damages, so it can never be a penalty. However, in spite of these theoretical inconsistencies, a valid liquidated damage clause can be the exclusive remedy.[131]

Other questions related to interpreting a liquidated damage clause also arise. For example, was the default clause meant to be a floor or ceiling?[132] The *Doyle* court interpreted the buyers' and seller's liquidated damage clauses differently. The seller's clause is interpreted to be a floor while the buyers' clause is interpreted to be a ceiling. Clearly, a court can find that a liquidated damages clause is a floor for one party and a ceiling for another party as long as the parties explicitly agree to such remedies in the contract.[133] However, the issue in *Doyle* is whether the court should have interpreted the liquidated damages clause as a ceiling when the parties did not negotiate the clause, and the parties' intent is based on omissions rather than on explicit language. If a court is allowed to interpret a party's omissions as well as terms not negotiated during the bargaining process as waivers of rights, the contractual bargaining process will dramatically change.

IV. CONCLUSION

The clearly erroneous standard of review should have been used rather than free review. The court based its standard of review on the contract being unambiguous. However, the court had to stretch when it declared, in effect, that a form contract, which does not include an expressed reservation of specific performance, is an unambiguous intention by that party to waive those rights. Furthermore, the opinion shows no indication that other reasonable interpretations were considered. For example, the liquidated damages clause could have been a floor rather than a ceiling. Given the ambiguities in *Doyle*, the court should have given greater deference to the trial court's findings, changed its

131. *See* ULTA § 2-516 (b) (1975); DOBBS, *supra* note 59, § 12.9(5).
132. DOBBS, *supra* note 59, § 12.9(5).
133. *Id.*

standard of review to clearly erroneous, or remanded the case for further inquiry.

The *Doyle* court's legal authority and analysis is insufficient to support its opinion. To find a waiver of specific performance, the court relied on dicta in *Margaret H. Wayne Trust v. Lipsky*,[134] which would allow a waiver if the contract was clearly drafted. Whether the contract was clearly drafted is highly debatable. Moreover, the court ignores various facts that distinguish *Lipsky* from *Doyle*, including the *Lipsky* opinion's implied waiver analysis. Furthermore, the court's claim that returning the earnest money and specific performance are inconsistent remedies is inaccurate since the buyers are not unjustly enriched and the seller's damages are not increased.

Finally, the public policies underlying the court's opinion are counter-intuitive and counter-productive. Generally, home buyers should not be required to list their rights in order to preserve them. Denying buyers the exchange they bargained for because of omissions on a standardized form prepared by the seller is nothing short of inequity, especially when the sellers' rights are preserved. Specific performance was created to provide equity, yet the court's refusal to allow specific performance in this case created inequity.

Robert L. Phillips

134. 846 P.2d 904 (Idaho 1993).