

## SUMMARY STATEMENT

*Phillips v. Gomez*, Docket No. 44594

The Idaho Supreme Court affirmed the district court's determination that Todd Phillips's claim for breach of contract had been fully satisfied by Phillips's retention of non-refundable earnest money as liquidated damages. This case came before the Supreme Court following Richard Gomez's breach of a real estate agreement for the sale and purchase of residential real estate from Phillips in his capacity as Trustee of Trust "A" of the Elliott Family Trust. The agreement required Gomez to put \$66,000 down as non-refundable earnest money that would be applied at closing. In the event Gomez could not close, the agreement provided that Phillips would have the option of accepting the earnest money as liquidated damages, which would be Phillips's sole and exclusive remedy, *or* pursuing any other legal right or remedy.

After the agreement was accepted by both parties and contingencies to the agreement were satisfied, the \$66,000 was released from the real estate broker to Phillips without restriction. Subsequently, Gomez informed Phillips he would not be able to close. Phillips later sold the property to another party for less than Gomez had agreed to pay. Phillips then sought the difference between what he sold the property for and what Gomez had agreed to pay, less the earnest money Phillips had already received. Phillips argued that his acceptance of the earnest money was not an election of remedies, and that he still had the right to pursue actual damages from Gomez. The district court concluded that making the earnest money non-refundable and immediately available to Phillips worked as an advance election of remedies.

The Supreme Court affirmed the district court and determined that the agreement gave Phillips an option between liquidated damages *or* actual damages, but it did not permit Phillips to choose both. The Supreme Court reasoned that a clause that allowed Phillips to keep the earnest money and pursue actual damages would have been easy to include, and should have been included if that was what the parties so intended. Because the parties did not expressly reserve such a right, the earnest money Phillips accepted as liquidated damages was Phillips's exclusive remedy. Accordingly, the district court's judgment in favor of Gomez was affirmed.