

NO.: A10-1945

STATE OF MINNESOTA
IN COURT OF APPEALS

BOB ACRES, LLC, a Minnesota limited liability company,

Appellant,

vs.

Schumacher Farms, LLC, a Minnesota limited liability company,

Respondent.

REPLY BRIEF

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TABLE OF CONTENTS

Table of Authorities	2
Legal Argument.....	3
Conclusion.....	12

TABLE OF AUTHORITIES

CASES	Page
<u>3511 13th Street Tenants' Ass'n v. 3511 13th Street, N.W. Residences, LLC</u> , 922 A.2d 439 (D.C. 2007)	3, 6-7
<u>Craigmile v. Sorenson</u> , 58 N.W.2d 865 (Minn. 1953)	5
<u>Green v. Minnesota Farmers' Mut. Ins. Co.</u> , 251 N.W. 14 (1933)	8, 10
<u>Huver v. Opatz</u> , 392 N.W.2d 237, 241 (Minn. 1986)	8
<u>Malmquist v. Peterson</u> , 183 N.W. 138 (Minn. 1921)	10
<u>Marblestone Co. v. Phoenix Assur. Co.</u> , 210 N.W. 385 (Minn. 1926)	9
<u>Petition of Hilltop Development</u> , 342 N.W.2d 344 (Minn. 1984)	11-12
<u>Pollard v. Southdale Gardens of Edina Condominium Ass'n., Inc.</u> , 698 N.W.2d 449 (Minn. Ct. App. 2005)	8-10
<u>Wolff v. McCrossan</u> , 210 N.W.2d 41 (Minn. 1973)	9-10
<u>Zimmerman v. Meyer</u> , No. A04-1567 (Minn. Ct. App. 2005)	10

Secondary Sources:

Benjamin N. Cardozo, <i>The Nature of the Judicial Process</i> (New Haven: Yale University Press, 1921).	4-5
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“What's in a name? That which we call a rose by any other name would smell as sweet.” Romeo and Juliet (II, ii, 1-2)

LEGAL ARGUMENT

The parties entered into a Purchase Agreement for the sale of land. That agreement expressly reads that (i) \$500.00 earnest money is to be paid, and (ii) it was paid. The earnest money was never paid. Both parties acted as though the Purchase Agreement was valid up to and beyond the closing date required by the agreement. Is the Purchase Agreement enforceable even though no earnest money was paid and the transaction failed to close?

The parties in this matter formed a contract when the mutual promises reflected in Purchase Agreement were exchanged at the signing of that agreement. This is the Appellant's position on appeal and it is a position that has the weight of logic, of longstanding legal principle and of prior case law behind it. *See, e.g.,* Appellant's Brief at 18-23, *citing* Craigmile v. Sorenson, 58 N.W.2d 865, 872 (Minn. 1953) (“The false recital of acknowledgement of receipt of the initial payment cannot be used by defendants to avoid the contract.”) and 3511 13th Street Tenants' Ass'n v. 3511 13th Street, N.W. Residences, LLC, 922 A.2d 439 (D.C. 2007) (“even where ‘the recital of a down payment is untrue’ because ‘the buyer had not yet paid[, s]uch a contract is nevertheless enforceable.’”).

This position is further borne out by reflecting on the objective evidence of the parties' intentions. Both parties to the Purchase Agreement (through their respective principals) acted as though a contract had been formed. The false recitation of an earnest money payment in the Purchase Agreement had no effect whatsoever on the conduct of the parties. The parties' intent, the very touchstone of contract jurisprudence, was to form an enforceable contract and the parties acted as though one was formed. *See* Appellant's Brief at 23-27.

The Respondent has tried to distinguish the facts from many of the cases initially cited by Appellant from the facts in the matter now before this Court. Respondent has done this well and this writer acknowledges that he can cite no case that is uniformly analogous on its facts. But of course, our common law does not limit the application of certain legal principles to cases with identical facts. Instead, the living law requires greater nuance and analysis than a simple or mechanical matching of facts. As Justice Cardozo once lectured:

[I]n a system so highly developed as our own, precedents have so covered the ground that they fix the point of departure from which the labor of the judge begins. Almost invariably, his first step is to examine and compare them. If they are plain and to the point, there may be need of nothing more. . . . But unless those conditions are present, the work of deciding cases in accordance with precedents that plainly fit them is a process similar in its nature to that of deciding cases in accordance with a statute. It is a process of search, comparison, and little more. Some judges seldom get beyond that process in any case. Their notion of their duty is to match the colors of the case at hand against the colors of many sample cases spread out upon their desk. The sample nearest in shade supplies the applicable

rule. But, of course, no system of living law can be evolved by such a process, and no judge of a high court, worthy of his office, views the function of his place so narrowly. If that were all there was to our calling, there would be little of intellectual interest about it. The man who had the best card index of the cases would also be the wisest judge. It is when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins.

Benjamin N. Cardozo, *The Nature of the Judicial Process*, 18-20 (New Haven: Yale University Press, 1921). It must be the rare event indeed where a court addresses a dispute whose facts are identical to those from an earlier case; and yet the great strength in our system of jurisprudence is its foundation of legal principles of general application that can be brought to bear upon so many diverse situations or disputes.

Thus Respondent's hard work fails to persuade because Respondent does not explain *why* the broader and longstanding legal principles upon which Craigmile was decided do not have equal application here. Both cases involve contracts for the sale and purchase of land; that one is a contract for deed and one an earnest money contract is a distinction without a difference in this case. In both cases, the contract at issue contains a "false recital" involving the initial payment of money. In Craigmile it is a down payment of \$2,500.00 "receipt of which is hereby acknowledged." 58 N.W.2d at 871. In the Purchase Agreement in this case it is \$500.00 "Earnest money herein paid" Appendix at 10.

What is the legal distinction between a down payment in one case and earnest money in another? This is hardly a metaphysical question – common sense informs us that each is a token intended to confirm a parties’ intent to later perform. Therefore, whether “down payment” or “earnest money” the essential nature of the thing is the same; like fair Juliet’s rose, which would smell just as sweet no matter what it were called.

Respondent also seeks to marginalize 3511 13th Street Tenants’ Ass’n, 922 A.2d 439 (D.C. 2007), obscurely writing that the case is “primarily procedural in import” and that the key holding in the case was *dicta*. Respondent’s Brief at 21. The Court of Appeals must review the cases on which an appellate advocate relies in order to ascertain whether the advocate is accurately and appropriately using the case for support. In this instance, a review of the case itself readily reveals that (i) it was not decided on matters of procedure, but instead on substantive law regarding the formation of enforceable contracts, and (ii) the proposition for which Appellant relies on that case is central to the court’s decision and not *dicta*, all contrary Respondent’s claims about the case and its holding.

The D.C. Court of Appeals, in its introduction, refers first to the trial judge’s error in concluding as a matter of law that the purchaser had entered into an executory contract that was not supported by valid consideration. 922 A.2d at 441. After explaining the factual and procedural background, the D.C. Court’s analysis

returns to this first point, explaining why the trial court erred in ruling that the failure to tender earnest money deprived the purchase agreement of consideration. This explanation, previously discussed in the Appellant's Brief at 18, consists of string of citations and authorities, from several jurisdictions, all standing for the legal principle, that "a promise is a sufficient consideration for a return promise. This has been true for at least four centuries, ever since bilateral contracts were recognized." 922 A.2d at 443.

The Respondent also seeks to marginalize the D.C. Appellate Court's ruling by asserting that it is unique to a D.C. regulatory framework, and further asserting that, within that framework, the D.C. Court "noted that failure to pay earnest money might also invalidate the Purchase Agreement" Respondent's Brief at 18. These assertions by the Respondent are entirely inaccurate. Instead, the D.C. Court of Appeals ruled that the regulatory scheme, a statute that imposed certain duties upon escrow holders, had *no effect* on the validity of an underlying real estate contract, writing that "nothing in the language of the statute implies that the legislature meant to invalidate real estate contracts solely because a third person – a broker or other intermediary – failed to maintain escrowed funds in the manner prescribed." 922 A.2d at 444. In summary, Respondent has not spoken at all to the question of why the general principle that mutual promises provide consideration for a contract would not apply in the instant case.

Along a similar theme, Respondent seeks to distinguish on their facts the cases that Appellant relies upon for the other key issue in this appeal, that is, whether the parties waived by their conduct the “time is of the essence” and written modification provisions of the Purchase Agreement. Once again, by examining the cases themselves, it is clear that Respondent is not accurate in its treatment of those cases.

For example, Respondent argues that Green v. Minnesota Farmers’ Mut. Ins. Co., 251 N.W. 14 (1933) and Pollard v. Southdale Gardens of Edina Condominium Ass’n., Inc., 698 N.W.2d 449 (Minn. Ct. App. 2005) are “embedded in a matrix of other substantive law” and consequently have nothing to say about a dispute over a land conveyance contract. Respondent’s Brief at 31. And it is correct that Green dealt with the waiver of an insurance-related provision and that Pollard with a “no-pets” rule in the landlord-tenant context. Significantly, however, it was this Minnesota Court of Appeals, in Pollard, that relied on (i) Green, (ii) one other case “embedded in a matrix” of insurance law, and (iii) a case stemming from a personal injury action, to explain the well-settled and overarching legal principle that:

a written contract may be modified by subsequent acts and conduct of the parties to the contract. *See, e.g., Huver v. Opatz*, 392 N.W.2d 237, 241 (Minn.1986). Because a nonwaiver clause may be modified by subsequent conduct, the mere presence of a nonwaiver clause does not automatically bar a waiver claim. *See Green v. Minnesota Farmers’ Mut. Ins. Co.*, 190 Minn. 109, 117, 251 N.W. 14, 17 (1933)

(acknowledging an insurance contract's nonwaiver clause, but holding that evidence of insurance agent's conduct supported the finding that there was in fact a waiver of the contract's forfeiture provision); *see also* Marblestone Co. v. Phoenix Assur. Co., 169 Minn. 1, 12-14, 210 N.W. 385, 386-87 (1926) (holding that insurer's conduct did not waive the right to limit coverage, even though existence of nonwaiver clause did not preclude the possibility of such a waiver).

Pollard, 698 N.W.2d at 453. Consequently, the issue before this court is whether, on the stipulated facts before it, and judged in light of the general principles of the law regarding waiver of an express contractual provision, a waiver of the time-of-the-essence clause has occurred. On the arguments and authorities already set forth in the Appellant's brief, Appellant continues to maintain that such a waiver has occurred.

Within the real estate conveyance "matrix", Appellant's arguments and cases compel the same conclusion. Respondent attacks Appellant for relying on Wolff v. McCrossan, 210 N.W.2d 41 (Minn. 1973), arguing that Wolff stands for the proposition that there must be "express oral statements" to support waiver. Indeed, it is correct to say that the course of conduct that prompted first the trial court and then the Minnesota Supreme Court to conclude in Wolff that a waiver of a specific time provision within an option agreement consisted primarily of oral statements by the seller's counsel. But does that fact render Wolff useless as support for waiver that is based in part at least on conduct (or the lack thereof) rather than oral statements? The Wolff case itself would say not, inasmuch as the

Supreme Court relied on an earlier case, Malmquist v. Peterson, 183 N.W. 138 (Minn. 1921), where no express statements were made and yet a waiver was found. See Wolff v. McCrossan, 210 N.W.2d at 44. What Wolff and Malmquist and Pollard and Green and Huver v. Opatz, 392 N.W.2d 237, 241 (Minn. 1986), stand for is the broad principle “that a written contract may be modified by subsequent acts and conduct of the parties to the contract.” That conduct might be a series of oral statements, as in Wolff, or it might be continuing to collect payments from a purchaser beyond a predetermined deadline, as in Malmquist, or it may be delay caused by the seller’s own actions or inactions, as in Zimmerman v. Meyer, No. A04-1567 (Minn. Ct. App. 2005).

One of the issues raised on the appeal in Zimmerman was whether “the district court erred in ruling that . . . the parties waived the time-is-of-the-essence provision of the agreement.” See Appellant’s Supplemental Appendix at 1. Writing for this Court, Judge Peterson describes the facts of the case, which are significant for (i) the efforts the buyer exerted to try to complete the transaction by the closing date, and (ii) the seller’s complicity in ignoring that deadline – “There is evidence that seller’s failure to provide proof of title delayed buyer’s efforts to secure financing in time for a January 3, 2003, closing” *Id.* at 3.

In a similar fashion, the facts in the instant case show that it was seller or, as in Wolff, seller’s counsel, who caused the delay in closing. Respondent has

chosen not to comment on, challenge or even explain why, when asked about closing arrangements in early August 2006, Respondent's real estate counsel remained silent, stonewalling until after the August 14, 2006, closing date, and then presenting a new demand, the request for an easement. This conduct constitutes, as a matter of law, a waiver of that closing date requirement.

Finally, and again without explaining *how* Appellant was to tender the purchase price on the date specified in the Purchase Agreement, Respondent asserts that Petition of Hilltop Development, 342 N.W.2d 344 (Minn. 1984), nevertheless established the rule that a tender should have been made to evidence Appellant's willingness to perform. This is a fabulous misstatement of Hilltop.

The issue in Hilltop related to the exercise of an option to purchase real estate and the court's analysis was limited to how the optionee, under the unique wording of the particular option agreement involved in that case, was required to exercise its option. This case is therefore of limited value for Respondent's purposes. To illustrate, after discussing how the question would "generally" or "usually" be resolved (342 N.W.2d at 346-47), the Hilltop court wrote:

It seems clear that if the contract had simply required the parties to close the sale immediately upon exercise of the option, Hilltop could have accepted this offer by giving clear notice of its intent to perform. An executory sale contract would then have been created, and this bilateral agreement would require both parties to proceed to closing. . . . *A potentially complicating factor here, however, is the language of the agreement fixing a final date for closing.*

Id. at 347 (emphasis added). So in fact, Hilltop does little for the Respondent's case. But notably, it lends further support of the Appellant's basic complaint with respect to the Trial Court's decision inasmuch as the Supreme Court confirms that mutual, exchanged promises to perform are sufficient consideration to form a bilateral contract for the purchase and sale of real estate:

Courts generally do not require a buyer to tender payment in order to exercise its option unless the parties clearly express that intent. If the contract does not require payment prior to exercise, the buyer's unambiguous notice of intent to purchase usually constitutes an effective acceptance of the option. This is true even where the contract calls for payment "immediately" upon exercise of the option, as does the disputed agreement here. *In such cases the buyer's notice of intent is an acceptance of the option by a promise to perform, and a bilateral contract of sale then arises between the parties.*

Id. at 346-47 (citations omitted)(emphasis added).

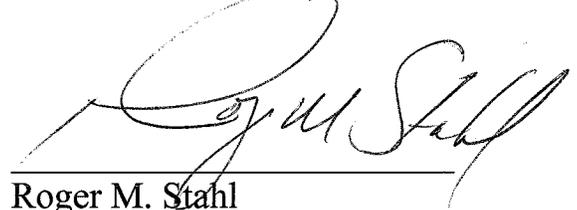
CONCLUSION

Respondent has failed to address the trial court's fundamental error in this case, its ruling that the failure to pay earnest money deprived the transaction of any mutual exchange of consideration. That the issue has not been addressed on precisely the same facts before in Minnesota is immaterial; the longstanding legal principle regarding contract formation and consideration, that an exchange of consideration sufficient to form a contract exists in the exchange of mutual promises, applies to this case and thus renders the Trial Court's legal conclusion erroneous as a matter of law. Respondent has also ineffectually challenged the

arguments and cases propounded by Appellant in favor of waiver in this matter. Finally, Respondent has not and cannot answer for the part that Respondent and its real estate counsel played in that waiver, choosing as they did to ignore the August 14, 2006, closing date, despite inquiries about that closing by the Appellant and its counsel. This Court should therefore (i) reverse the Trial Court's Order of March 9, 2009, and (ii) remand this matter to the Trial Court for further proceedings consistent with the decision of this Court.

Dated: December 28, 2010

WENDLAND UTZ, LTD.

A handwritten signature in black ink, appearing to read "Roger M. Stahl", written over a horizontal line.

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