contract had ever been in existence." Maybe so; but almost no testimony regarding this was presented at trial. Lewis may have believed that the earnest money was nonrefundable. Perhaps he did not want to encounter the hostility of having it refunded. Whatever his reason, the fact that he failed to request the return of the earnest money does not make this case one [in which] Lewis received a benefit or services under a proposed agreement. Lewis could have been clearer with respect to the fact that he was rejecting the counteroffer. He may have known that the Prides assumed their counteroffer had been accepted and were proceeding accordingly. Perhaps as a courtesy he should have informed the Prides that he did not accept their counteroffer. Regardless of whether he breached cultural mores, Lewis had no legal duty to act or explicitly reject the counteroffer. The Prides erroneously assumed that silence was equivalent to acceptance. This case does not fit with the line of cases holding that an offeree's conduct or failure to act amounted to acceptance of an offer. The Prides should have secured Lewis's acceptance to the counteroffer before advancing the transaction. This court cannot create a contract where one did not exist.

Reversed in favor of Lewis.

Pride v. Lewis 179 S.W.3d 375 (Mo. Ct. App. 2005)

Andrew and Joyce Kay Pride owned a house located in Nodaway County. In 2002, they moved to a farm and placed the house for sale with Priority One Realty. The house sat empty for some time. The Prides then found a tenant to rent the house for $450 per month until such time as it sold. In April 2003, the Prides were informed that Larry Lewis had made an offer to purchase the house for $55,000. The initial offer from Lewis was rejected. The Prides's realtor presented them with the second contract, already signed by Lewis and his realtor. This contract—which Lewis signed on April 9, 2003—stated a closing date of May 15, 2003. The Prides changed this date, by hand, to June 1, 2003, and signed the contract on April 9, 2003. The Prides and their realtor initialed the change in the closing date, but Lewis did not. Upon signing the contract, the Prides informed their tenant that she would have to vacate the house by June 1, 2003.

The Prides became aware that there was a problem with closing on the property in June, when the closing was scheduled to occur. They, along with their realtor, were prepared to close on the property but neither the Lewis nor his wife nor their realtor ever appeared. The Prides's realtor contacted Lewis's realtor and was informed that Lewis had not responded to phone calls or otherwise communicated with his realtor. When the closing failed to occur, the Prides sent him a letter notifying him of his default and relisted the house with a realtor. The house sold in June 2004 for $40,000, which was the highest offer the Prides received for the house. In addition, the Prides were unable to secure another tenant for the additional year the house was for sale. The Prides sued Lewis for breach of contract, seeking the damages for the difference between the $55,000 contract price with Lewis and the $40,000 for which the house actually sold, for the lost rent the year they were unable to find another tenant, and for attorney's fees, as provided in the contract. The trial court entered judgment in favor of the Prides and awarded them $20,900 in damages. Lewis appealed.

Ulrich, Presiding Judge

Before a plaintiff can establish a breach of contract, he or she must first establish the existence of a contract. A contract does not exist without a definite offer and a 'mirror-image' acceptance. Any acceptance that includes new or variant terms from the offer presented amounts to a counteroffer and a rejection of the original offer. The unequivocal acceptance of the offer is fundamental to the existence of a contract.

Lewis contends that the Prides made a counteroffer when they changed the closing date from May 15, 2003, to June 1, 2003. While both the Prides initialed this change, it was undisputed that neither Mr. nor Mrs. Lewis initialed the change to the contract. The Prides acknowledge that changing the closing date amounted to a counteroffer. The question is, was the counteroffer ever accepted? Lewis argues that he never accepted this counteroffer, and, thus, there was no contract. The Prides argue that Lewis accepted their counteroffer through his conduct and failure to act. They specifically list three facts that manifest Mr. Lewis's acceptance of their counteroffer. They are: (1) Lewis never contacted his real estate agent, the Prides, the Prides's real estate agent, or anyone else to reject the counteroffer; (2) Lewis knew the closing was to take place in early June; and (3) Lewis never sought the return of his earnest money.

As a general rule, silence or inaction cannot constitute acceptance of an offer. This general rule does have exceptions, however. Acceptance of an offer or counteroffer does not always have to be made through explicit spoken or written word. An offer may be accepted by conduct or failure to act. This is the rule of law upon which the Prides rely. They claim that Lewis's conduct and failure to act amount to an acceptance of their counteroffer. While this statement of the law is accurate, it is of no avail in this case. This rule applies primarily to instances where services are rendered and the party benefited by the services is aware of the terms upon which the services are offered. If this party receives the benefit of the services in silence, when there was a reasonable opportunity to reject them, this party is manifesting assent to the terms proposed and thus accepts the offer.

The case relied upon by the Prides for the rule of law that conduct may amount to acceptance of an offer is *Environmental Waste Management, Inc. v. Industrial Excavating & Equipment, Inc.* (Mo. App. W.D. 1998). In *Environmental Waste Management, Inc.*, the plaintiff sent the defendant a letter wherein its prices for contaminated soil removal were listed. The defendant allowed the plaintiff to remove contaminated soil, but then refused to pay the prices listed in the letter. The plaintiff subsequently sued for breach of contract and the court held that, by allowing the plaintiff to remove the contaminated soil, the defendant accepted the offer in the letter. The Prides advance the similarity of this case. Lewis did not accept services or benefit under the terms of an agreement and later claim never to have accepted the agreement. This case is not analogous. As noted Lewis had no duty to reject the counteroffer.

Further, while Lewis failed to request the refund of his earnest money, this is not sufficient to create a binding contra The Prides argue that: "Logic would indicate that a person wou desire the return of their earnest money if they believed that