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E. Kelley, Judge.

REVERSED AND REMANDED.

Kent A. Simmons of Liebke & Simmons, Davenport, for plaintiffs-appellant.

defendants-appellees.

Heard by Oxberger, C.J., Schlegel, and Hayden, JJ.

OXBERGER, C.J.

Plaintiffs-appellants (Gibsons) appeal from summary judgment in their suit for rescission/or damages in their purchase of a home from defendants-appellees (Estate). We reverse and remand.

The trial court held:

The record is clear that both the plaintiffs and the seller estate were represented by counsel at the closing held February 17, 1984. It is apparent from the contract that paragraph 6 was placed there for the benefit of the purchaser. A person can waive a condition of contract by conduct and indicate their intention by conduct. That is what occurred in this case.

The burden establishing waiver is on the defendant. In determining whether defendant has met this burden, we apply the law stated in Knapp v. Simmons, 345 N W 2d 118, 121 (Iowa 1984);

...summary judgment is still not proper if reasonable minds could draw different inferences and conclusions from the undisputed facts (citation). In this respect, summary judgment is functionally akin to a directed verdict, (citation) every legitimate inference that reasonably can be deduced from the evidence should be afforded the nonmoving party, and a fact question is generated if reasonable minds can differ on how reasonable minds can differ on how the issue should be resolved.

The only conduct of the Gibsons was silence in not asking whether the Estate had obtained the termite inspection and the conduct of hiring a lawyer to be present at the closing who also failed to inquire regarding the termite inspection.

Silence and retaining counsel by buyer is not such conduct that establishes as a matter of law waiver of the right to expect performance by the seller of a duty he promised to perform. The trial court should have denied the motion for summary judgment on this ground.

Mutual Mistake

Appellant has also appealed the trial court's ruling on mutual mistake. Since our ruling will require a trial on the merits, we do not reach the issue of mutual mistake. Facts may be developed at trial that could affect any ruling we may make under the present state of the record.

REVERSED AND REMANDED.