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No. 67242-8-1

**COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION ONE**

NIGEL AND KATHLEEN DOUGLAS, Respondents

v.

TERRY VISSER and DIANE VISSER,
and the marital community thereof, Appellants.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY
#09-2-01208-0

BRIEF OF RESPONDENT

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INTRODUCTION

This case involves a real estate agent, who was also the property owner, intentionally selling a home with concealed wood rot, wood destroying organisms, and structural defects. Defendant Terry Visser was a licensed real estate agent, and with his wife, Diane, owned 4391 Masterson Road in Blaine, Washington. When the Vissers purchased the property in June 2005, the land and buildings were in bad shape. The Vissers saw an opportunity to make money flipping houses. Terry Visser intended to complete the renovations himself.

Two years and \$40,000 later, the structural damage was far more extensive than the Vissers anticipated. Rather than complete the repairs, Terry Visser covered up the defects to sell the property. Kelly Hatch, a licensed contractor who briefly worked for Visser, testified at trial to the cover up.

- A. ...I went in to talk to Terry. I said let me show you something. I said the siding is really rotted here. And, um, I don't know that we should really put this bellyband back on...[Y]ou should cut up two feet on the siding, look behind it and see what's going on in there, otherwise, you have to tear out the sheetrock from the inside and that's harder to replace.
- Q. What did Mr. Visser say in response to that?

- A. He said I am out of money on the place and we just need to put a new bellyband on there. I said that's not the way I think it should be done. But it's your house. It's your license. It's your business what you do with your house.

(1/12/11 VRP 266). Hatch left the job soon after.

When Mr. Visser took the stand, Superior Court Judge Ira Uhrig interrupted the direct examination to ask who had nailed new boards over the rotted areas. (1/12/11 VRP 309-311) (Exhibits 55 and 56; Attached as Appendix A). Mr. Visser conceded that he did. (1/12/11 VRP 311).

After a three-day bench trial, Judge Uhrig found by clear, cogent and convincing evidence that Mr. Visser fraudulently concealed structural wood rot and water damage with new siding. (Findings of Fact and Conclusions of Law; CP 26-33) (Attached as Appendix B) Because substantial evidence supports this finding, Plaintiffs Nigel and Kathleen Douglas respectfully request this Court to affirm the trial court's judgment, dismiss this appeal, and award them reasonable attorneys' fees on appeal.

I. RESTATEMENT OF ISSUES PRESENTED

The Vissers' appeal presents five issues:

- A. "When we evaluate evidence in a bench trial, our review is limited to determining whether substantial evidence

supports the findings and whether the findings support the conclusions of law.” Jensen v. Lake Jane Estates, 165 Wn. App. 100, 104, 267 P.3d 435 (2011). Judge Uhrig found that the Vissers knew about structural damage to the house, covered it up, and did not disclose this to the Douglasses. Viewing the facts and reasonable inferences in favor of the Douglasses, does substantial evidence support these findings?

B. “Independent of the obligations in...a residential real estate sales contract, the vendor...has an affirmative duty to disclose material facts, of which the vendor or seller has knowledge, and which are not readily observable upon reasonable inspection by the purchaser.” Eastwood v. Horse Harbor Foundation, Inc., 170 Wn.2d 380, 391, 241 P.3d 1256 (2010). The trial court found by clear, cogent and convincing evidence that the Vissers failed to disclose material facts about the home they sold to the Douglasses. (Findings of Fact ¶ 15; CP 28). Does substantial evidence support the trial court’s ruling?

C. Under RCW 18.86.030, a real estate agent must “disclose all existing material facts known by the licensee and not readily apparent or readily ascertainable to a party.” The trial court found that “the Vissers did not disclose the full extent of the work

done on the house, nor did they disclose the wood rot they discovered.” (Findings of Fact ¶ 6; CP 27). Does substantial evidence show that Mr. Visser violated his statutory duties as a real estate agent?

D. “A [real estate] agent or broker violates the [Consumer Protection Act] when they knowingly fail to disclose a known material defect in the sale of real property.” Svendson v. Stock, 143 Wn.2d 546, 558, 23 P.3d 455 (2001). Here, because he renovated the house as well as acted as listing agent, Terry Visser had independent knowledge of the concealed defects in the house he sold to the Douglases. Does substantial evidence prove that Mr. Visser violated the Consumer Protection Act?

E. “As to a claim that the evidence does not justify an award of [emotional distress] damages, CR 59(a)(7), there must be no evidence or reasonable inference from the evidence to justify the award.” Nord v. Shoreline Sav. Ass'n., 116 Wn.2d 477, 487, 805 P.2d 800 (1991). Both Nigel and Kathleen Douglas testified to the stress, anxiety, anger, and emotional distress that accompanied discovering the Vissers’ fraud and having to move out of their house. (1/11/11 VRP 78, 108; 1/13/11 VRP 392, 405). Does

substantial evidence support the trial court's award of \$12,000 in emotional distress damages?

II. STATEMENT OF FACTS

Nigel Douglas is a retired RCMP officer. (1/11/11 VRP 20). His wife, Kathleen, also worked for the RCMP as a civilian member. (1/13/11 VRP 383). In 2007, the couple began looking for a summer cottage in Washington State. They chose Birch Bay because Nigel had vacationed there as a boy. (1/11/11 VRP 21) ("grew to love the area and the people"). In April 2007, the Douglasses thought they had reached their goal. They purchased 4391 Masterson Road from Terry and Diane Visser.

A little more than a year later, the Douglasses discovered that their summer cottage was rotten to the core. While trying to discover the source of mold in the house, Nigel and his contractor removed the exterior siding to look inside. What Nigel saw sickened him.

- Q. So off came the trim board, off came the bellyband and what did you see?
- A. Hank immediately explained, oh, you have a big, big problem here and he put the [crow]bar right into the sill plate that's visible here and went in and probably halfway in, there was no resistance to it at all.

Q. What did it smell like?

A. Um, it smelled pretty bad, um, and as we went around the south side, sir, of the house and we took off longer lengths of the bellyband, um, I had to step back. It was one of the most putrid smells that I have come across even in my mounted police service. It was close to what I call the smell of death. It was. And, again, I was hit with a diesel train and I didn't know what to think.

Q. What did it look like?

A. It was moving. It was seething. It was putrid and I was shocked.

(1/11/11 VRP 78). Trial exhibits 37, 38, 39, 40 and 43 show the rot that Nigel discovered (Attached as Appendix C). They are a small sample of the photographs that document the concealed damage.

The Douglasses discovered that 50 to 70% of the sill plate and rim joist in their house had rotted away. (9/21/08 Inspection Report; Trial Exhibit 50). The sill plate is a piece of lumber that lies flat on the rim of the concrete foundation. (1/11/11 VRP 172). The rim joist is a vertical piece of wood that rests on the sill plate. (1/11/11 VRP 171). Both are essential to the structural integrity of the home (1/11/11 VRP 172) ("major structural concern...like questionable whether it's habitable again).

This lawsuit concerns the Vissers' liability for concealing this rot rather than fixing or disclosing it. The Vissers never obtained permits for the work they did, and as a consequence, no one inspected it. (Findings of Fact ¶ 14; CP 28). Instead, the Vissers sold the home as newly renovated, knowing that it was structurally unsound.

A. The Vissers' Opening Brief Fails To Provide A Fair Statement Of The Facts

Under RAP 10.3(a)(5), the Vissers' opening brief should have contained "a fair statement of the facts and procedure relevant to the issues presented for review, without argument." Instead, the Vissers give their side of the story, repeating factual assertions that the trial court rejected. For example, they claim that Terry Visser did not know about the wood rot and structural damage throughout the house.

But for the rot in the bathroom and the water damage to the sub-floor in the northeast corner of the residence, which Visser repaired, *Visser did not notice any other damage while performing the work.*

(Opening Brief at 5) (emphasis added).

The trial court found the exact opposite.

The home and property were in bad shape. During the course of renovating the house, the Vissers discovered significant wood rot to the sill plate and rim

joist that connects the concrete foundation to the frame.

The Vissers also discovered water damage and rot to the joists that hold up the house's floor.

Rather than correct these defects, the Vissers or their hired help made superficial repairs to the visible damage and covered up the rest. The Vissers also did not obtain permits for any of the work on the property.

(Findings of Fact ¶¶ 3-5; CP 27) (Attached as Appendix B).

The Vissers' statement merely repeats testimony the trial court found unbelievable. "As a general principle, an appellant's brief is insufficient if it merely contains a recitation of the facts in the light most favorable to the appellant even if it contains a sprinkling of citations to the record throughout the factual recitation." Estate of Lint, 135 Wn.2d 518, 532, 957 P.2d 755 (1998).

Rather than rebut the Vissers' statement of facts line-by-line, the Douglasses will present the trial court's findings and conclusions that established the Vissers' liability. In Section IV below, the Douglasses will show how substantial evidence and reasonable inferences uphold the trial court's rulings.

B. Terry Visser Knew The House Had Structural Damage

The trial court concluded that Terry Visser committed at least three fraudulent acts when he sold the Masterson Road house to Nigel and Kathleen Douglas. First, Visser failed to reveal that the sill plate and rim joist had significant rot and insect damage. (Finding of Fact ¶ 3; CP 27). Second, he concealed the structural damage rather than repair it. (Finding of Fact ¶ 5; CP 27). Third, he intentionally misrepresented the nature of repairs he made to the house. “The Vissers represented to the Douglasses that the house needed only minor repairs, not requiring permits, and that the Vissers did not change the structure.” (Finding of Fact ¶ 7; CP 27).

At the heart of these findings is that Mr. Visser saw the destruction to the sill plate and rim joists and knew that the house needed substantial structural repairs. (Findings of Fact ¶ 3; CP 27). The trial court did not believe Mr. Visser’s claim that he did not know about the defects.

C. Visser Concealed The Damage Rather Than Fix It

Next, the trial court found that the Vissers concealed the structural damage.

The Vissers acted as owner, renovator, and listing agent for the Masterson Road property and had full knowledge of the property's condition.

In this capacity, the Vissers knowingly concealed rot, mold, infestation, and decay in the Masterson Road house.

In this capacity, the Vissers made structural repairs that were substandard and shoddy, and did more to conceal the problems than remedy them.

In this capacity, the Vissers made significant repairs and modifications without obtaining the required permits.

(Findings of Fact ¶¶ 11-14; CP 28).

In addition to concealing the structural damage, the Vissers failed to disclose what they saw.

The Vissers did not tell the whole truth on the disclosure forms or on the Douglases' follow-up questions. The Vissers had a duty to disclose the concealed defects and failed to do so.

(Findings of Fact ¶ 15; CP 28). The court made clear that "Terry Visser had independent knowledge of the concealed defects at the Masterson Road property that he failed to disclose." (Findings of Fact ¶ 22; CP 29). Furthermore, "Mr. Visser negligently misrepresented the nature of the repairs he made to the Masterson Road house, and negligently concealed wood rot in the structure and foundation of the home." (Findings of Fact ¶ 24; CP 29).

D. The Douglases Did Not Know About the Structural Damages

The trial court concluded that the Douglases did not know about the concealed structural damage and could not have discovered it through a reasonable inspection. "The defects were unknown to the Douglases and were not discoverable by careful and reasonable inspection." (Findings of Fact ¶ 17; CP 29). Mr. Visser had successfully concealed the damage from discovery. Even though the Douglases had the home inspected, the rotted sill plate and rim joists were hidden from view. (Findings of Fact ¶ 17; CP 29).

E. The Douglases Suffered Damage As A Result Of Purchasing An Uninhabitable Home

As a consequence of the Vissers' concealment, the Douglases unknowingly purchased an uninhabitable home. The trial court found that the structural damage was so severe that the home was a total loss.

The Court finds that the reasonable cost of replacing the Masterson Road house is \$103,000. Because of the extent of wood rot and structural damage, the least expensive method to restore the house to a habitable state is to tear it down and rebuild.

(Findings of Fact ¶ 37; CP 31). Furthermore, the court concluded that the Douglases appropriately mitigated their damages by moving out.

The Court finds that the Douglases took all reasonable steps to mitigate their damages. Because the concealed defects compromised the home's structure, any repairs would be futile and more expensive than tearing down the house and rebuilding it.

(Findings of Fact ¶ 43; CP 31).

The court awarded the Douglases damages equal to \$144,500 and an award of \$48,025.50 in reasonable attorneys' fees. (Conclusions of Law ¶¶ 5-6; CP 32). The court then concluded that the Douglases owed \$170,093.07 in principal and interest under their promissory note with the Vissers. (Conclusions of Law ¶ 8; CP 32). Offsetting the two figures, the court entered judgment in the Douglases' favor for \$24,244.77.

The Vissers now appeal, arguing that substantial evidence does not support Judge Uhrig's decision. Because the trial court had ample evidence to find the Vissers liable, Nigel and Kathleen Douglas respectfully request the Court to affirm the judgment, dismiss the Vissers' appeal, and award reasonable attorneys' fees on appeal.

ARGUMENT

III. STANDARD OF REVIEW

This court reviews the trial court's findings of fact for substantial evidence in the record and conclusions of law de novo.

When we evaluate evidence in a bench trial, our review is limited to determining whether substantial evidence supports the findings and whether the findings support the conclusions of law. Substantial evidence is the quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. We review all reasonable inferences in the light most favorable to the prevailing party. Though the trier of fact is free to believe or disbelieve any evidence presented at trial, “[a]ppellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-fact.” Quinn v. Cherry Lane Auto Plaza, Inc., 153 Wn. App. 710, 717, 225 P.3d 266 (2009), review denied, 168 Wn.2d 1041, 233 P.3d 888 (2010). And we review questions of law de novo.

Jensen v. Lake Jane Estates, 165 Wn. App. 100, 104-105, 267 P.3d 435 (2011)(citations omitted).

IV. SUBSTANTIAL EVIDENCE SUPPORTS JUDGE UHRIG'S FINDINGS

A. Terry Visser Discovered The Structural Damage And Covered It Up

Both direct and circumstantial evidence proves that Terry Visser discovered the structural damage in the Masterson Road home. First, Kelly Hatch, Terry Visser's contractor, testified to discovering structural damage throughout the house. It began with

Hatch notifying Visser that the floors near the bathroom were too soft from water damage to repair.

A. I told [Visser] the wood was bad and I couldn't screw into it and what should be done is rip out the plywood and rip it out to see if the joists are also bad.

Q. What did Mr. Visser say in response to that?

A. Exact words, but the, the end result was he couldn't put any more money into it and if there was a way to put a patch there to hook the wood down and hook the track down and then leave it alone.

Q. Was there any doubt or did it appear that Mr. Visser understood what you had told him about the floor?

A. I believe he did. I believe he did.

Q. And did Mr. Visser appear concerned about the fact that there was rot that hadn't been replaced?

A. Well, my only concern, my feeling was he was more concerned with getting the track down and getting the doors down to get the carpet put in.

(1/12/11 VRP 262-63).

Hatch had a second, similar conversation with Visser when they removed the bellyband and siding from the house's exterior. Much like Nigel Douglas would discover two years later, Hatch and

Visser found substantial wood rot and insect damage behind the siding.

Q. What happened when you tried to put the bellyband on?

A. I went to remove the one that was there. It had rotted and it was in bad shape. I pulled it off. It come off in pieces and at that time, you know, I went in and said, hey, look, this is really rotted. The siding is rotted.

(1/12/11 VRP 265). Rather than fix the damaged areas, Visser told Hatch to cover it up as best he could.

He said I got a piece, I think it's one by six in this case. He says I have a piece of one by six, let's put that up there. I looked to see what he had. It was MDF. Which is paperboard. You can't use it outside...He said, no, let's just put it up. I said whatever. I put a bunch of caulking behind it and put it up there and MDF is not real flimsy like that and I pumped a bunch of nails into it with my nail gun and even doing that it was so soft. It kept buckling out and finding studs it would shoot in and pull back out again. The wood was so rotted behind it. And I just, I says man that's --- I said, Terry, I don't know if it's going to stay. *He said we'll caulk it good and paint it good and seal it good and we'll be fine.*

(1/12/11 VRP 266-67) (emphasis added).

Second, Terry Visser conceded at trial that he had nailed new wood to the rotted sill plate and rim joist. Trial exhibits 25, 27, 31-32, 41-43, and 55-57 are photographs that all show new tongue and groove lumber nailed to rotted wood or patching an area that

had been destroyed. Mr. Visser made all these repairs himself, from the same piece of lumber.

Q. I would like you to take a look at Exhibit 57. This has previously been identified as a closer photograph of the new piece of wood and in looking at this, it looks like it has got a notch up top and a tongue down below. Did you use a piece of tongue and groove to attach on to the existing joist.

A. Yeah, I guess I did. Yes, I did.

* * * *

Q. Was there any other wood that you replaced either on the sill plate or sill joist around the perimeter of this house?

A. The only place was the bath.

Q. ...Okay, Let me show you Plaintiff's Exhibit 25. There appears to be a new piece of tongue and groove in Exhibit 25.

A. Uh-huh.

Q. Is that the piece that you put in?

A. Yes, it is.

Q. Was it actually from the same piece of tongue and groove?

A. Yeah.

(1/12/11 VRP 311-12). It is inconceivable that Mr. Visser did not notice the rot and insect damage surrounding the areas that he patched with new wood.

Third, circumstantial evidence also proves that Mr. Visser knew about the concealed rot. Kirk Juneau, a licensed home inspector and a member of the American Society of Home Inspectors, examined the Masterson Road house after the Douglasses discovered the rot. Mr. Juneau concluded that the person making the repairs had to know the extent of structural damage.

Q. Based on your review of the repairs done that we have seen in these photographs, did you reach any conclusion on the quality of the repairs?

A. It was poor workmanship quality. It appeared that the people or person performing these repairs did not have enough knowledge of building science to do adequate repairs to the structure.

Q. And based on your inspection of the sill plate and sill joists, did you reach any conclusion on the structural integrity of this house?

A. The structural integrity was in question definitely with the amount of rot and decay that I saw to the floor joists, the rim joists and the sill plate.

Q. And based on your inspection of the bellyband area and the sill plate, did you reach any conclusions regarding what a person could see of this rot when they were putting the bellyband on to the building?

- A. They would have direct sight of the wood rot and decay that was being covered up by the bellyband being installed.

(1/12/11 VRP 223-24). (1/11/11 VRP 174) (“there is no way that any person that knows how to function a hammer would be able to not recognize that there was a concern with trying to install bellyband over the material that was decayed and rotted”)

In his opening brief, Mr. Visser asserts without support that the house’s condition in 2008 was somehow different from when he sold it in 2007. (Opening Brief at 13). Not only is this speculation, it is wrong. As Mr. Juneau testified,

- Q. What conclusions did you reach with regard to wood rot in the house?

- A. The wood rot was quite extensive, was not recent activity. Meaning that it didn’t happen within the last several months of ownership, that it was a long ongoing process that happened over several years.

(1/11/11 VRP 193-94). The physical evidence also disproves Mr. Visser’s assertion. The tongue and groove material that he installed has no wood damage. Only the areas around his repairs show the significant, long-term rot. (9/21/08 Flaherty Report; Trial Exhibit 50) (“the extent of damage to the sill and rim joist could not have occurred since the installation of the skirt board siding”).

Finally, Mr. Visser makes this claim.

Nothing demonstrates that at the time of sale, Visser had actual knowledge of the concealed rot, mold or pest infestation. The evidence does establish, however, that Douglas had knowledge.

(Opening Brief at 24). The contradiction in this argument should be obvious. How could the Douglases know about structural damage that Terry Visser - the person who renovated the house – did not?

In sum, substantial evidence supports the trial court's conclusion that Terry Visser discovered the structural damage to the Masterson Road home, made a few shoddy repairs, and covered it up. Although he now tries to avoid responsibility for his actions, Mr. Visser was caught, and the trial court had no trouble discounting his denials.

B. The Vissers Did Not Disclose The Damage Or The Need for Structural Repairs

In Findings of Fact ¶ 7, the trial court found,

the Vissers represented to the Douglases that the house needed only minor repairs, not requiring permits, and that the Vissers did not change the structure.

(Findings of Fact ¶ 7; CP 27). Because the Vissers did not assign error to this finding, it is a verity on appeal. State v. Kaiser, 161

Wn. App. 705, 724, 254 P.3d 850 (2011) (“unchallenged findings of fact are verities on appeal”).

The Vissers also concede that they improperly answered Form 17, the Real Estate Seller Disclosure Statement. (Trial Exhibit 10). “The disclosure statement was inadequately filled out by Visser, because Visser had put “don’t know” on many items.” (Opening Brief at 7). The Vissers affirmatively misrepresented that the house needed only minor repairs, and withheld their knowledge of the structural defects in the house. Substantial evidence therefore supports the trial court’s conclusion that the Vissers fraudulently concealed the extent of damage and failed to disclose the material facts of the structural problems with the home.

C. The Douglases Did Not Know About The Damage

Substantial evidence also supports the trial court’s conclusion that Nigel and Kathleen Douglas did not discover the concealed wood rot before purchasing the house. First, both Mr. and Mrs. Douglas testified that they had no idea that 50 to 70% of the sill plate and rim joist were destroyed.

Q. Now, after reviewing Mr. Flaherty’s [home inspection] report, did you have any concerns about the property?

- A. Well, to be very candid, um, no, but there is some concessions there that, um, I was neither blind nor oblivious to the fact that a 35 or 40-year old home is going to need some attention sooner or later. I was quite prepared and so was my wife to engage on anything that needed to be done on a small, on a small scale and there is nothing like sweat equity into your own home. I was quite prepared to do that. If I wasn't able to do it or had the skills, I would find a way to do it.
- Q. So you had your own observations, you had the disclosure form and the subsequent statements from the Vissers and you had Dennis Flaherty's report. And looking at those three, what did you conclude?
- A. Concluding the visual, the home itself, I concluded that it was a moving home that had no one in it prior to us visiting it, it was a newly renovated home with no other occupants and we were prepared to go ahead with the sale and make an offer.

(1/11/11 VRP 44) (1/13/11 VRP 384) (cottage was "cute, real cute, a little jewel box on the inside and out"). The Douglasses had no idea that hidden behind the new exterior was structurally unsound sill plates and rim joists.

Second, a reasonable inspection did not uncover the hidden damage. Dennis Flaherty, the Douglasses' original home inspector, conducted a standard examination. (1/11/11 VRP 157). What he found was consistent with a 40-year old home.

Q. And today do you remember anything that was unusual about this inspection?

A. No. I wouldn't say so, at the time that that inspection there were a lot of houses that were newly painted and, um, dressed up, um, on the market. So it wasn't uncommon to see an older house that had been recently renovated with bathroom fixtures and paint, et cetera.

(1/11/11 VRP 160). Furthermore, the small area of rot and repair that Mr. Flaherty discovered was not unusual. (1/11/11 VRP 162).

When Mr. Flaherty returned to the home after Nigel had removed the exterior siding, he was shocked at what he saw.

- The rim joist around the perimeter of the house exhibited 50% to 70% wet rot and pest damage due to ongoing water intrusion and Carpenter Ant Infestation...
- The sill plate around the perimeter exhibited 50% to 70% wet rot and pest damage also due to ongoing water intrusion and Carpenter Ant activity.

(9/21/08 Flaherty Report; Trial Exhibit 50). Not only did Mr. Flaherty have no idea this existed during the first inspection, he had never seen concealed defects of this magnitude.

Q. [In your] five years of inspections, have you ever seen concealed wood rot like this?

A. Never.

(1/11/11 VRP 176).

The trial court appropriately rejected the Vissers' argument that enough clues existed to tip the Douglasses off to the concealed damage. Neither a reasonable inspection, nor the Douglasses' reasonable questions, put them on notice that 50 to 70% of their home's structure was damaged. The Vissers had effectively hidden the damage from view.

D. Substantial Evidence Supports The Trial Court's Damage Award

The trial court based its damage award on competent evidence from the Douglasses and their expert witnesses.

Damages must be supported by competent evidence, but a party who has established the fact of damage will not be denied recovery on the basis that the amount of damage cannot be exactly ascertained. Evidence is sufficient if it affords a reasonable basis for estimating the loss and does not subject the trier of fact to speculation and conjecture.

Transpac Development, Inc. v. Oh, 132 Wn. App. 212, 221, 130 P.3d 892 (2006).

First, the court agreed with the Douglasses' expert architect and contractor, Craig Telgenhoff, that the building was a total loss.

Q. So the sill plate and rim joist, while you were out there did you observe evidence of rot and insect damage?

A. There was extensive rot and dry rot damage.

Q. And in your opinion does that affect the structural integrity of the home?

A. The only thing that could potentially be holding the house down is the weight of the building itself.

(1/13/11 VRP 346). Mr. Telgenhoff made two bids – one to renovate the cottage for \$123,000 and one to rebuild it for \$103,000. (Trial Exhibits 68-69).

The trial court concluded that rebuilding the cottage was the appropriate measure of damages. (Findings of Fact ¶ 37; CP 31). The court then awarded consequential damages based on Kathleen Douglasses' testimony. This included \$3000 for home inspections, and \$1500 in moving expenses. (1/13/11 VRP 401).

Second, the court found that the Douglasses mitigated their damages appropriately. (Findings of Fact ¶ 43; CP 31). Although the Vissers characterize the damage as mold, the true damage to the house was the rotten sill plate and rim joist. No amount of cleaning would have made the cottage structurally sound. As the trial court concluded correctly, "because the concealed defects compromised the home's structure, any repairs would be futile and more expensive than tearing down the house and rebuilding it." (Findings of Fact ¶ 43; CP 31).

Finally, the court awarded the Douglasses \$12,000 in emotional distress damages. Mrs. Douglas testified to the emotional damage from discovering they had been defrauded and now had to clean up the mess.

How do you explain emotional? Lesser people would have divorced. My husband and I have a very good relationship and, um, short of sleepless nights, lots of crying, and um, disappointment, I can't, you can't describe what we went through. Luckily, luckily, we don't have to live in that home 12 months out of the year and raise children in a home like that. Otherwise, we would have been renting or been out on the street. So, um, like the family we gave three heaters to that didn't have heat in their home, so it was very stressful.

(1/13/11 VRP 405-06) (1/11/11 VRP 54) ("this brought us to, again, a very emotional time"). In addition, the Douglasses were unknowingly living in a house infested with mold and destructive insects.

The Vissers challenge the damage award on two grounds: (1) the court did not apply the "benefit of the bargain" remedy; and (2) insufficient evidence exists for emotional distress damages. Neither argument is persuasive.

The Douglasses paid the Vissers \$189,000 for the land and cottage. In 2007, the year of the sale, the land was worth \$50,000, meaning the improvements would be worth \$139,000. (Property

Tax Assessment; Trial Exhibit 70). Because the cottage was structurally unsound, it was worthless. The trial court's award of \$103,000 for the structure was below what the Douglases paid for it. If anything, the trial court's damage award credited the Vissers with more than they deserved.

Next, the court appropriately assessed emotional distress damages. In Nord v. Shoreline Sav. Assn., 116 Wn.2d 477, 805 P.2d 800 (1991), the Supreme Court granted emotional distress damages for intentional wrongdoing.

This court has liberally construed damages for emotional distress as being available merely upon proof of 'an intentional tort.' Cagle v. Burns & Roe, Inc., 106 Wn.2d 911, 916, 726 P.2d 434 (1986); Cherberg v. Peoples Nat'l Bank, 88 Wn.2d 595, 602, 564 P.2d 1137 (1977); see also Hunsley v. Giard, 87 Wn.2d 424, 431, 553 P.2d 1096 (1976). In none of these cases has the court required that emotional distress be severe in order to be compensable as an element of damages based upon intentional wrongdoing.

Nord, 116 Wn.2d at 482. Once the Douglases proved the Vissers' *liability* for intentional wrongdoing, "plaintiff is only required to prove emotional distress in order to recover the damages attributable to the wrongful act." Nord, 116 Wn.2d at 484.

Contrary to the Vissers' assertion, the Douglases are not required to prove objective symptoms.

The objective symptom requirement applies in cases where negligent infliction of emotional distress is asserted, and goes to proof of liability, not damages. The trial court properly rejected defendant's claim that objective symptoms must be shown before compensatory emotional distress damages may be awarded. As to defendant's claim that the evidence did not support an award of emotional distress damages, we uphold that award, thus confirming the trial court's rejection of this objection.

Nord, 116 Wn.2d at 485-486.

Finally, because \$12,000 is modest compared to the total damage judgment, the trial court's award is not excessive. "The damage award was not so 'flagrantly outrageous and extravagant' as to manifest passion or prejudice." Lian v. Stalick, 106 Wn. App. 811, 825, 25 P.3d 467 (2001).

V. The Independent Duty Rule Applies To Fraudulent Concealment And Violations of Statutory Duties

A. Visser Had An Independent Tort Duty

The Washington Supreme Court recently issued two opinions that underscore Terry Visser's liability as a real estate agent and for fraudulent concealment. Both limit the scope of the economic loss rule. First, in Eastwood v. Horse Harbor, 170 Wn.2d 380, 241 P.3d 1256 (2010), the Court made clear that the economic loss rule does not extinguish tort duties that exist independently of a contract.

The economic loss rule does not bar recovery in tort when the defendant's alleged misconduct implicates a tort duty that arises independently of the terms of the contract. In some circumstances, a plaintiff's alleged harm is nothing more than a contractual breach or a difference in the profits, revenue, or costs that the plaintiff had expected from a business enterprise. In other circumstances, however, the harm is simultaneously the result of the defendant breaching an independent and concurrent tort duty. Thus, while the harm can be described as an economic loss, it is more than that: it is an injury remediable in tort. The test is not simply whether an injury is an economic loss arising from a breach of contract, but rather whether the injury is traceable also to a breach of a tort law duty of care arising independently of the contract. The court defines the duty of care and the risks of harm falling within the duty's scope.

Eastwood, 170 Wn.2d at 393-94. As noted below, a real estate agent's duties -- to act in good faith and to disclose all material information -- exist independently of any contracts.

Second, in Affiliated FM Insurance Co. v. LTK Consulting Services, 170 Wn.2d 442, 243 P.3d 521 (2010), the Supreme Court affirmed that by breaching a duty, a professional can be liable to a third party for tort damages. An engineering firm, LTK, contracted with the City of Seattle to maintain the monorail. In a separate contract, the City contracted with SMS to run the monorail and make emergency repairs. No contract existed between LTK and SMS.

After the blue line of the monorail caught fire, SMS sued LTK for negligently repairing the electrical ground system for the trains. Affiliated, 170 Wn.2d 440. The Federal District Court dismissed SMS's complaint under the economic loss rule, and the Ninth Circuit certified the issue to the Washington Supreme Court. The Supreme Court held that SMS could sue LTK in tort for damages.

Applying the independent duty doctrine here, we hold that SMS may sue LTK for negligence. LTK, by undertaking engineering services, assumed a duty of reasonable care. This obligation required LTK to use reasonable care, as we have defined it, with respect to risks of physical damage to the monorail. SMS enjoyed legally protected interests in the monorail, and LTK's duty encompassed these interests.

Affiliated, 170 Wn.2d 460-61. Because SMS was within the scope of LTK's duty, and a fire was within the duty's risk of harm, LTK was liable to SMS for damages from the fire.

Finally, both cases substantially limited the reach of Alejandro v. Bull, 159 Wn.2d 674, 153 P.3d 864 (2007), a case defendant Visser relies on extensively.

The term "economic loss rule" has proved to be a misnomer. It gives the impression that this is a rule of general application and any time there is an economic loss, there can never be recovery in tort. This impression is too broad for two reasons. First, it pulls too many types of injuries into its orbit. When a contractual relationship exists between the parties, any harm arising from that relationship can be

deemed an economic loss for which the law of tort never provides a remedy. Further, any injury that can be monetized can be thought of as an economic loss presumptively excludable under the rule because the legislature has defined “ ‘[e]conomic damages’ ” as “objectively verifiable monetary losses, including medical expenses, loss of earnings, burial costs, loss of use of property, cost of replacement or repair, cost of obtaining substitute domestic services, loss of employment, and loss of business or employment opportunities.” RCW 4.56.250(1)(a).

Second, and most importantly, the broad application of the economic loss rule does not accord with our cases. Economic losses are sometimes recoverable in tort, even if they arise from contractual relationships.

Eastwood, 170 Wn.2d at 387-88. In sum, defendant Visser’s duties as a real estate agent exist independently of the real estate contracts in this case, and the economic loss rule does not insulate Visser from liability.

B. Visser Violated His Statutory Duties

Under RCW 18.86.030, Terry Visser, as a real estate agent, owed the Douglases duties to act honestly and to disclose what he knew.

(1) Regardless of whether the licensee is an agent, a licensee owes to all parties to whom the licensee renders real estate brokerage services the following duties, which may not be waived:

(a) To exercise reasonable skill and care;

(b) To deal honestly and in good faith;

* * * *

(d) To disclose all existing material facts known by the licensee and not apparent or readily ascertainable to a party; provided that this subsection shall not be construed to imply any duty to investigate matters that the licensee has not agreed to investigate.

RCW 18.86.030. This duty exists as a matter of statute, not contract.

A selling agent's failure to disclose a material defect to a buyer violates these duties. In Bloor v. Fritz, 143 Wn. App. 718, 180 P.3d 805 (2008), real estate agent Lance Miller did not disclose that the property he listed had been a meth lab. Both the trial court and Court of Appeals found him liable to the purchasers.

Because substantial evidence supports the trial court's finding that Miller knew of the methamphetamine manufacturing on the property, and that finding supports a conclusion that Miller violated his duty to disclose known material facts about the property, Miller's argument fails. The trial court did not err in concluding that Miller violated RCW 18.86.030.

Bloor, 143 Wn. App. at 733-734.

Like the agent in Bloor, Visser failed to disclose what he knew about the concealed defects and inadequate repairs. To put it simply, Visser was in over his head with this property. He had

never bought a home for renovation before, and misjudged the expense and effort needed. Rather than sell the home “as is” with full disclosure of the problems, Visser advertised the property as newly renovated and intentionally withheld his knowledge of the extensive rot undermining its foundation.

Visser violated his statutory duty to disclose hidden, material defects. This is identical to the common law duty that required agents to disclose. “If a broker willfully or negligently conveys false information about real estate to a buyer, the broker is liable therefor.” Hoffman v. Connall, 108 Wn.2d 69, 77-78, 736 P.2d 242 (1987); Svendsen v. Stock, 143 Wn.2d 546, 557-558, 23 P.3d 455 (2001) (“Edwards had knowledge of the water problems, independent of Edwards’ involvement in preparing the seller disclosure form, and failed to disclose this knowledge to Svendsen or his agent provides support for the jury’s determination that Scott committed fraudulent concealment”).

VI. The Vissers Violated The Consumer Protection Act

A real estate agent’s violation of his duty to disclose also violates the Consumer Protection Act. Returning to Bloor v. Fritz, the Court of Appeals held that an agent’s failure to disclose the property was a meth lab violated the Act.

Miller, acting as a real estate agent, failed to disclose a known material fact, a history of illegal drug manufacturing, in the sale of the property to the Bloors. His conduct occurred in the course of his business of offering residential property for sale to the public. He advertised the property for sale to the public by listing it on the multiple listing service directory and placing a for sale sign on the property. And, although he did not actively solicit the Bloors, the record shows that the parties did not occupy equal bargaining positions. The trial court did not err in finding that Miller's conduct impacted a public interest. These findings support the trial court's conclusion that Miller violated the Act.

Bloor v. Fritz, 143 Wn. App. 718, 737, 180 P.3d 805 (2008);
Svensen v. Stock, 143 Wn.2d 546, 558, 23 P.3d 455 (2001) (“an agent or broker violates the CPA when they knowingly fail to disclose a known material defect in the sale of real property”). The same ruling is appropriate here.

The Consumer Protection Act has five elements: “(1) unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) public interest impact, (4) injury to plaintiff in his or her business or property, and (5) causation.” Bloor, 143 Wn. App. 718, 735, 180 P.3d 805 (2008). Undisputed evidence proves all five. First, Visser’s failure to disclose the concealed defects was an unfair or deceptive act.

Miller does not dispute that he advertised the property for sale to the public by listing it in the multiple listing

service directory and placing a for sale sign on the property. He also showed the property to another prospective buyer before the Fritzes accepted the Bloors' offer. Miller did not disclose the history of illegal drug manufacturing on the property to the Bloors or the other prospective purchaser, or on the multiple listing service directory. Listing and showing the property without disclosing its history of illegal drug manufacturing had the capacity to deceive any member of the public who used the directory or expressed interest in the property.

Bloor, 143 Wn. App. at 735-736. Second, it occurred in Visser's trade as a real estate agent.

Third, Visser's actions impacted the public interest. As the Supreme Court ruled in Svensden,

we conclude that the public interest requirement of the CPA was established. The record shows that Scott's conduct in concealing its knowledge of the drainage problems on the property occurred in the course of Scott's business. It also shows that Scott advertised the subject property to the public by listing it in the multiple listing service directory. Under the circumstances, it cannot be said that the parties occupied equal bargaining positions.

Svensden, 143 Wn.2d at 559. Fourth, Visser's violation injured the Douglasses by depriving them of an informed decision in buying the property. Fifth, Visser's violation caused the Douglasses' damages. But for his misrepresentations, the Douglasses would not have purchased the property.

The Vissers claim that “the misrepresentations complained of by Douglas arise solely out of the disclosure statement.” (Opening Brief at 40). This is incorrect. Because the Vissers had direct, independent knowledge of the concealed defects, the Dougases’ claims arise from the Vissers failure to disclose and their fraudulent misrepresentations of essential facts. Terry Visser committed fraud while acting as a real estate agent with a publicly listed property.

VIII. The Trial Court Properly Reformed The Interest Rate

The Vissers complain that the trial court reduced the interest rate on their promissory note from a default 18% to 6.5%. As the trial court ruled, giving the Vissers the default rate would be unjust.

The court finds that the Vissers’ fraudulent concealment and misrepresentation breached the promissory note and deed of trust, but did not void them.

The Douglasses remain liable under the note for the unpaid principal and interest at 6.5%. The total amount owing on entry of this Judgment is \$170,093.07.

An award of attorneys’ fees to the Vissers under the note would unjustly enrich them.

(Findings of Fact ¶¶ 34-36; CP 30-31). The trial court properly exercised its discretion to craft a remedy for the Vissers’ breach.

Bort v. Parker, 110 Wn. App. 561, 580, 42 P.3d 980 (2002)(“a person has been unjustly enriched when he has profited or enriched himself at the expense of another contrary to equity”).

IX. The Consumer Protection Act Entitles The Douglasses To Attorneys’ Fees On Appeal.

Under RCW 19.86.060, the Consumer Protection Act provides an award of reasonable attorneys’ fees to the prevailing party. This applies as well on appeal.

The District Court correctly determined that the Holts are entitled to an award of a reasonable attorney’s fee pursuant to RCW 19.86.090. We remand to the Superior Court for a determination of reasonable attorney’s fees on appeal to that court. The Holts are also entitled to a reasonable attorney’s fee on appeal to this court. Wilkinson v. Smith, 31 Wn. App. 1, 15, 639 P.2d 768, review denied, 97 Wn.2d 1023 (1982) (the Consumer Protection Act provides “adequate grounds” for the award of attorney’s fees on appeal).

Evergreen Collectors v. Holt, 60 Wn. App. 151, 157, 803 P.2d 10 (1991).

The Douglasses respectfully request an award of reasonable attorneys’ fees on appeal.

CONCLUSION

Nigel and Kathleen Douglas bought 4391 Masterson Road in good faith. They reasonably believed what the owner -- a real estate agent who also renovated the house -- told them about the

home only needing minor repairs. As Judge Ira Uhrig found by clear, cogent and convincing evidence, Terry Visser lied to the Douglasses and concealed structural damage to sell the home quickly. Because substantial evidence supports the trial court's findings, the Douglasses respectfully request this Court to affirm the trial court's judgment, dismiss this appeal, and award reasonable attorneys' fees on appeal.

DATED this 10 day of April, 2012.

BURI FUNSTON MUMFORD, PLLC

By

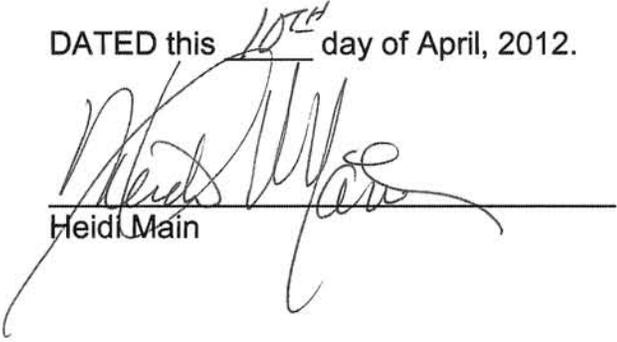

Philip J. Buri, WSBA #17637
1601 F. Street
Bellingham, WA 98225
360/752-1500

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the date stated below, I mailed or caused delivery of Brief of Respondent to:

Greg Thulin
Law Offices of Gregory E. Thulin, P.S.
119 N. Commercial Street, Suite 660
Bellingham, WA 98225

DATED this 10th day of April, 2012.

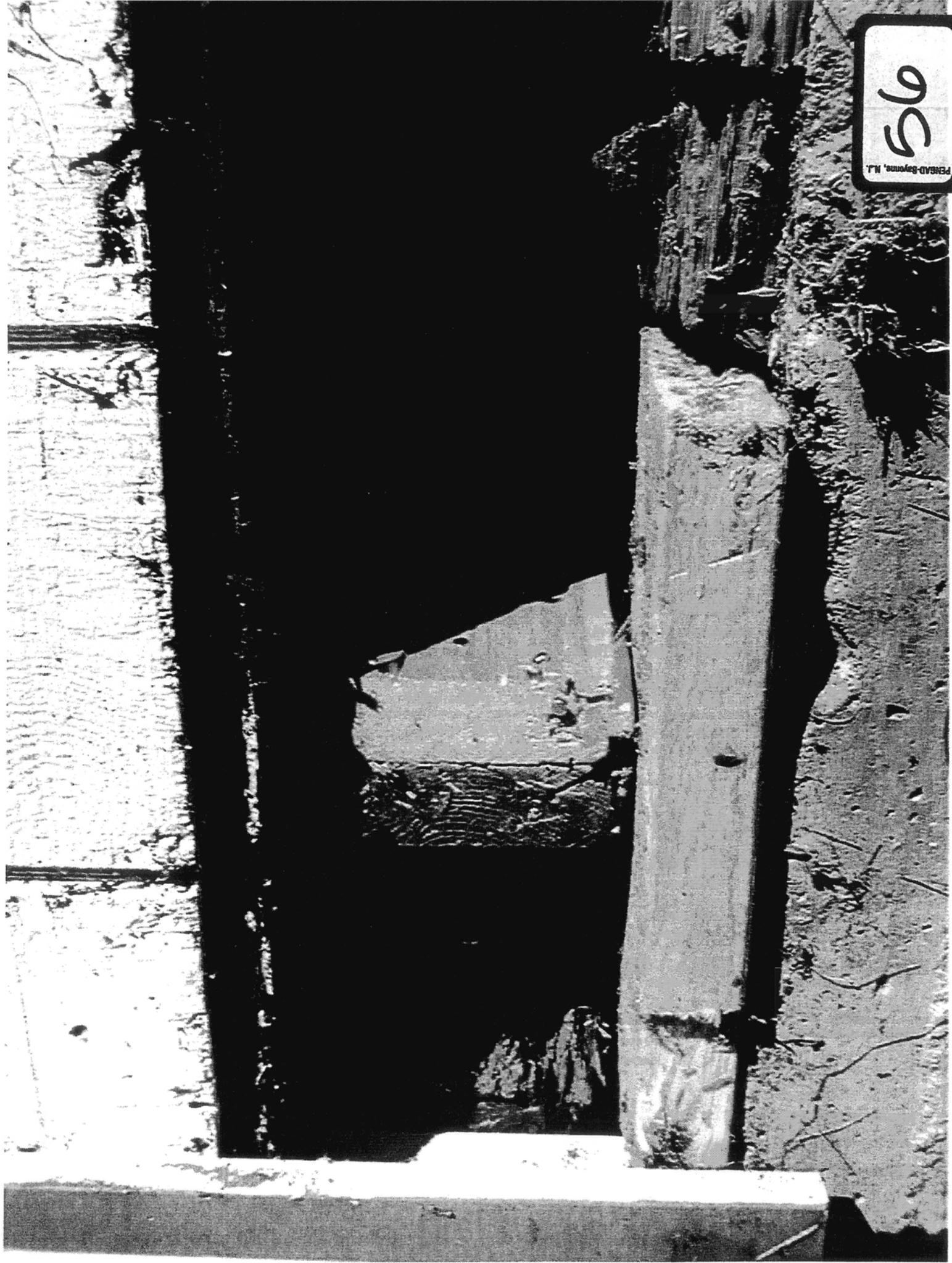


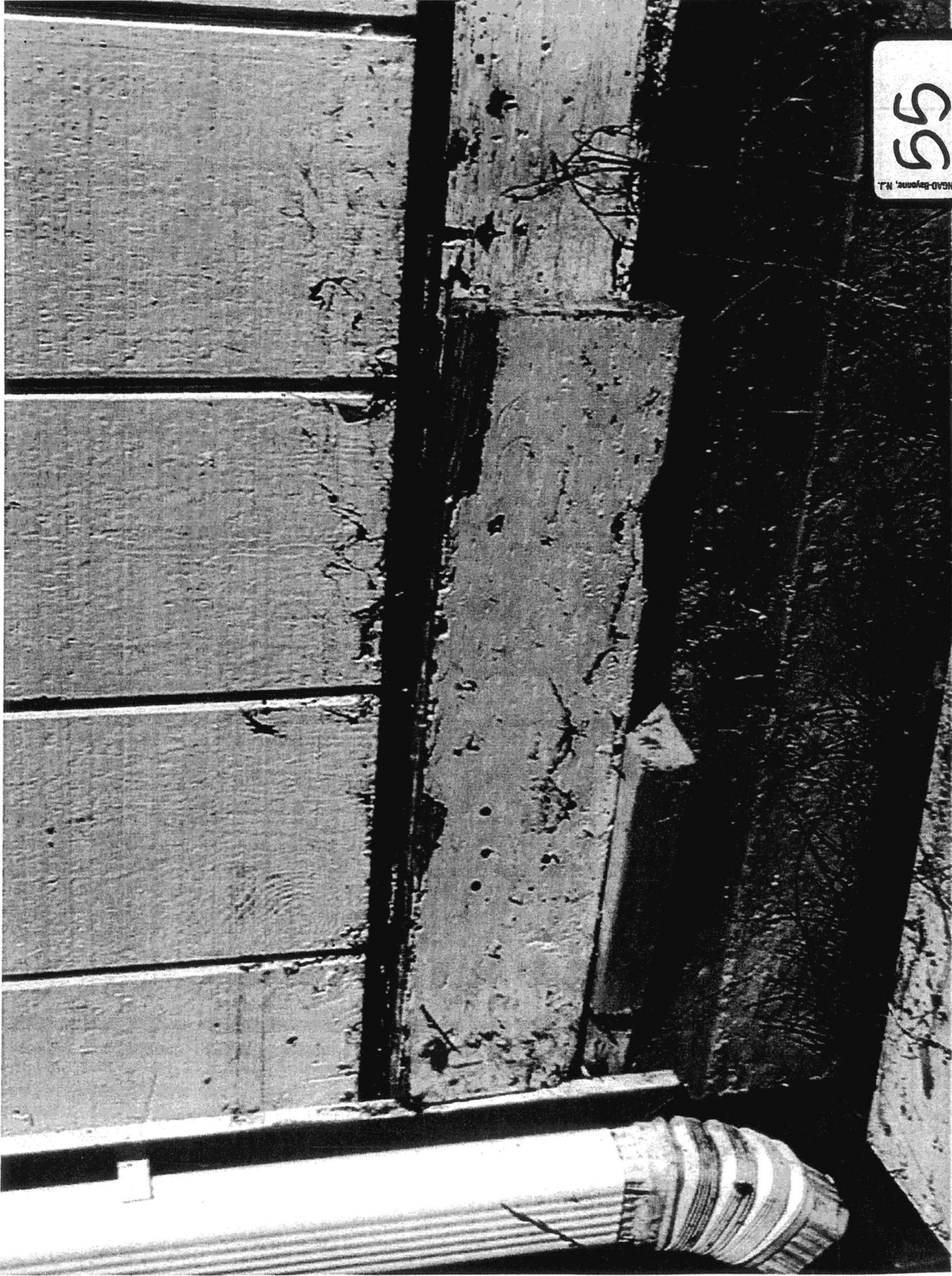
Heidi Main

ATTACHMENT A

PERGAD-Sayona, M.J.

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55
PENGAD-Bojone, N.I.

ATTACHMENT B

SCANNED 8

FILED IN OPEN COURT
5-6 2011
WHATCOM COUNTY CLERK

By Jr
Deputy

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WHATCOM

NIGEL and KATHLEEN DOUGLAS, and
the marital community thereof,

Plaintiffs,

v.

TERRY VISSER and DIANE VISSER,
and the marital community thereof,

Defendants

Cause No. 09-2-01208-0

FINDINGS, CONCLUSIONS, AND
JUDGMENT

(Clerk's Action Required)

JUDGMENT SUMMARY

Judgment Creditors:	Nigel and Kathleen Douglas
Judgment Creditors' Attorney:	Philip Buri, Buri Funston Mumford, PLLC
Judgment Debtors:	Terry and Diane Visser
Total Amount of Judgment Less offsets:	\$24,244.77.
Interest On Judgment:	12% simple interest
Taxable Costs	\$1812.34.
Reasonable Attorneys Fees	\$48,025.50.



81

FINDINGS OF FACT

1
2 1. This matter came before the Court for a bench trial on January 11-13,
3 2011. Plaintiffs Nigel and Kathleen Douglas appeared and were represented by Philip
4 Buri, Buri Funston Mumford, PLLC. Defendants Terry and Diane Visser appeared and
5 were represented by Greg Thulin, Law Offices of Greg E. Thulin, PS.

6 2. In June, 2005, Terry and Diane Visser purchased the land and buildings at
7 4391 Masterson Road in Blaine, Washington. The Vissers bought the property as an
8 investment with the intent to renovate it and rent the property.
9

10 3. The home and property were in bad shape. During the course of
11 renovating the house, the Vissers discovered significant wood rot to the sill plate and
12 rim joist that connects the concrete foundation to the frame.

13 4. The Vissers also discovered water damage and rot to the joists that hold
14 up the house's floor.

15 5. Rather than correct these defects, the Vissers or their hired help made
16 superficial repairs to the visible damage and covered up the rest. The Vissers also did
17 not obtain permits for any of the work on the property.
18

19 6. In May 2007, the Vissers sold 4391 Masterson Road to Plaintiffs Nigel
20 and Kathleen Douglas. During the three months that preceded the sale, the Vissers did
21 not disclose the full extent of the work done on the house, nor did they disclose the
22 wood rot they discovered.

23 7. The Vissers represented to the Douglases that the house needed only
24 minor repairs, not requiring permits, and that the Vissers did not change the structure.
25
26

1 17. The defects were unknown to the Douglasses and were not discoverable
2 by a careful and reasonable inspection.

3 18. The Vissers' false and misleading statements and omissions were made
4 to induce a business transaction. Had the Vissers told the truth, the Douglasses would
5 not have bought the property.

6 19. The Douglasses reasonably relied on the Vissers' statements.

7 20. The Vissers' fraudulent concealment caused damage to the Douglasses as
8 specified below.

9
10 **Counts II and III: Negligent Misrepresentation and Breach of Statutory Duties**

11 21. Terry Visser was a licensed real estate agent and acted as the listing
12 agent for the Masterson Road property

13 22. As the listing real estate agent, Terry Visser had independent knowledge
14 of concealed defects at the Masterson Road property that he failed to disclose.

15 23. Mr. Visser had a statutory duty to disclose all material facts he knew and
16 that were not apparent or readily ascertainable to the Douglasses.

17 24. Mr. Visser negligently misrepresented the nature of the repairs he made to
18 the Masterson Road house, and negligently concealed wood rot in the structure and
19 foundation of the home.

20 25. Mr. Visser violated his statutory duties as a real estate agent by failing to
21 deal honestly and in good faith with the Douglasses.

22 26. Mr. Visser violated his statutory duties as a real estate agent by failing to
23 disclose the concealed defects in the home to the Douglasses.
24
25
26

1 27. As a proximate cause of Mr. Visser's negligence and violation of his
2 statutory duties, he damaged the Douglasses as specified below.

3
4 **Count IV: Consumer Protection Act**

5 28. As a licensed real estate agent, Terry Visser is subject to the Washington
6 Consumer Protection Act, RCW Ch. 19.86.

7 29. Mr. Visser engaged in unfair or deceptive acts by concealing defects in the
8 home he listed for sale and by misrepresenting and fraudulently concealing those
9 defects from the Douglasses.

10 30. Mr. Visser committed these unfair or deceptive acts in the course of his
11 business as a licensed real estate agent.

12 31. Mr. Visser's acts adversely affected the public interest because they were
13 committed in the course of his business, were advertised to the public, were used to
14 solicit the Douglasses' business, and occurred with the parties occupying unequal
15 bargaining positions.

16 32. Mr. Visser's acts damaged the Douglasses as specified below.

17 33. Mr. Visser's acts were the proximate cause of the Douglas' damages.

18
19
20 **Count V: Breach of Contract**

21 34. The Court finds that the Vissers' fraudulent concealment and
22 misrepresentation breached the promissory note and deed of trust, but did not void
23 them.

24 35. The Douglasses remain liable under note for the unpaid principal and
25 interest at 6.5%. The total amount owing on entry of this Judgment is \$170,093.07.
26

CONCLUSIONS OF LAW

1
2 1. The Court has personal jurisdiction, subject matter jurisdiction and venue
3 to decide this case.

4 2. Plaintiffs Nigel and Kathleen Douglas have proven by clear, cogent and
5 convincing evidence that Defendants Terry and Diane Visser fraudulently concealed
6 material defects in the property at 4391 Masterson Road.

7 3. The Douglases have proven by a preponderance of the evidence that
8 Defendant Terry Visser, while acting as a licensed real estate agent: (1) negligently
9 misrepresented the condition of the property at 4391 Masterson Road; and (2) violated
10 his statutory duties under RCW 18.86.030.

11 4. The Douglases have proven by a preponderance of the evidence that
12 Terry Visser violated the Consumer Protection Act while acting as a licensed real estate
13 agent.
14

15 5. As a consequence of the Vissers' actions, the Douglases incurred
16 damages equal to \$144,500.

17 6. The Douglases have incurred reasonable attorneys fees equal to
18 \$48,025.50. Under the Consumer Protection Act, the Douglases are entitled to this
19 amount as prevailing party in this lawsuit.
20

21 7. The Douglases have incurred costs equal to \$1812.34, and as prevailing
22 party, they are awarded that amount.

23 8. The Douglases owe the Vissers \$170,093.07 in principal and interest
24 under the promissory note. That amount is an offset against the total the Vissers owe
25 the Douglases.
26

1 9. Within 14 days of entry of this judgment, the Vissers shall reconvey the
2 Douglases Deed of Trust to them, and shall retain the Douglases' promissory note
3 marked "paid in full".

4 10. Judgment shall enter for the Douglases in the amount of \$24,244.77.

5 Dated this 6 day of May, 2011.

6
7
8 By: _____

9 Judge Ira Uhrig
10 Whatcom County Superior Court

11 Presented by:

12 BURI FUNSTON MUMFORD, PLLC

13 

14 Philip Buri, WSBA #17637
15 Attorney for Plaintiffs

16 Approved for Entry;
17 Notice of Presentation Waived:

18 LAW OFFICES OF GREGORY E. THULIN

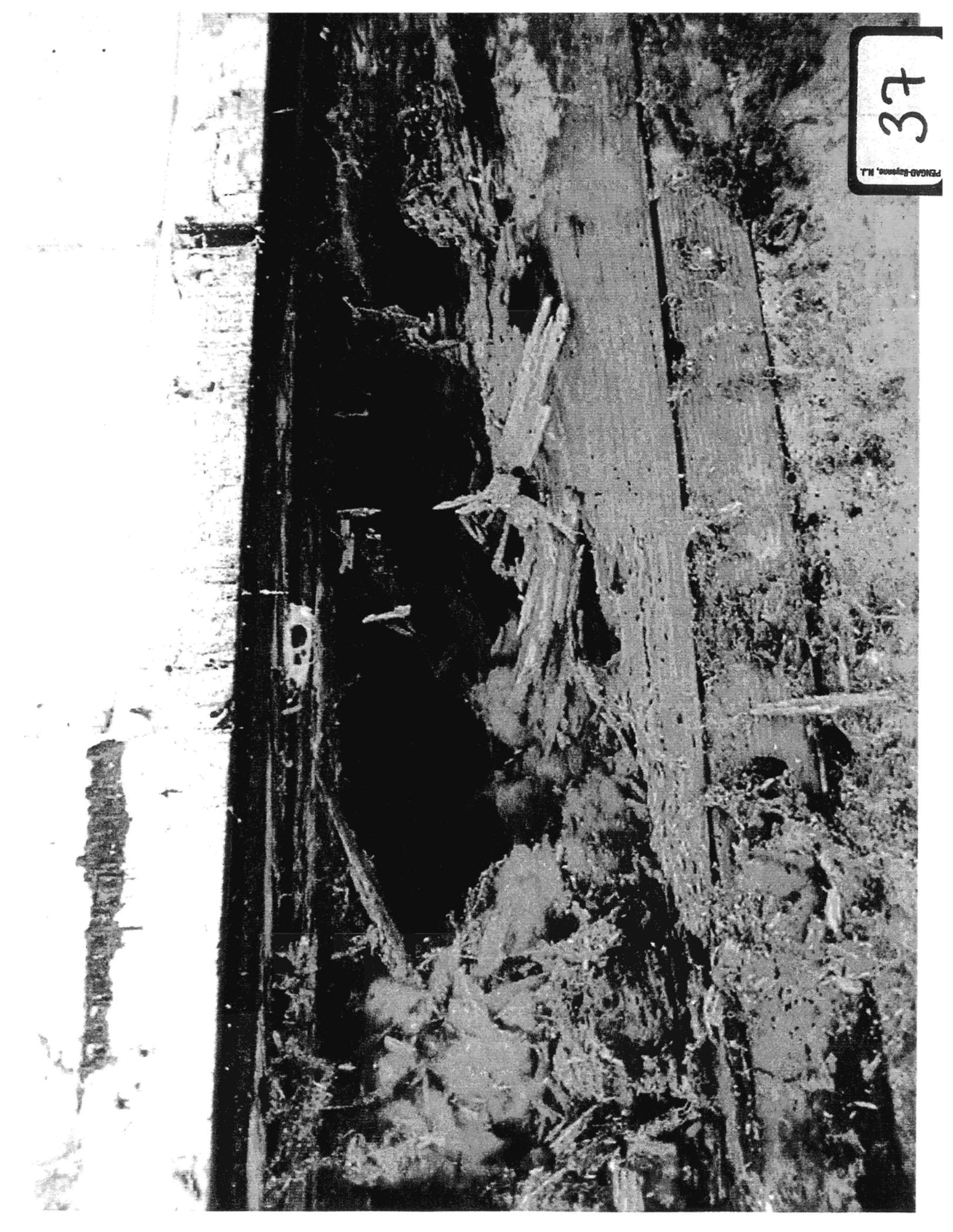
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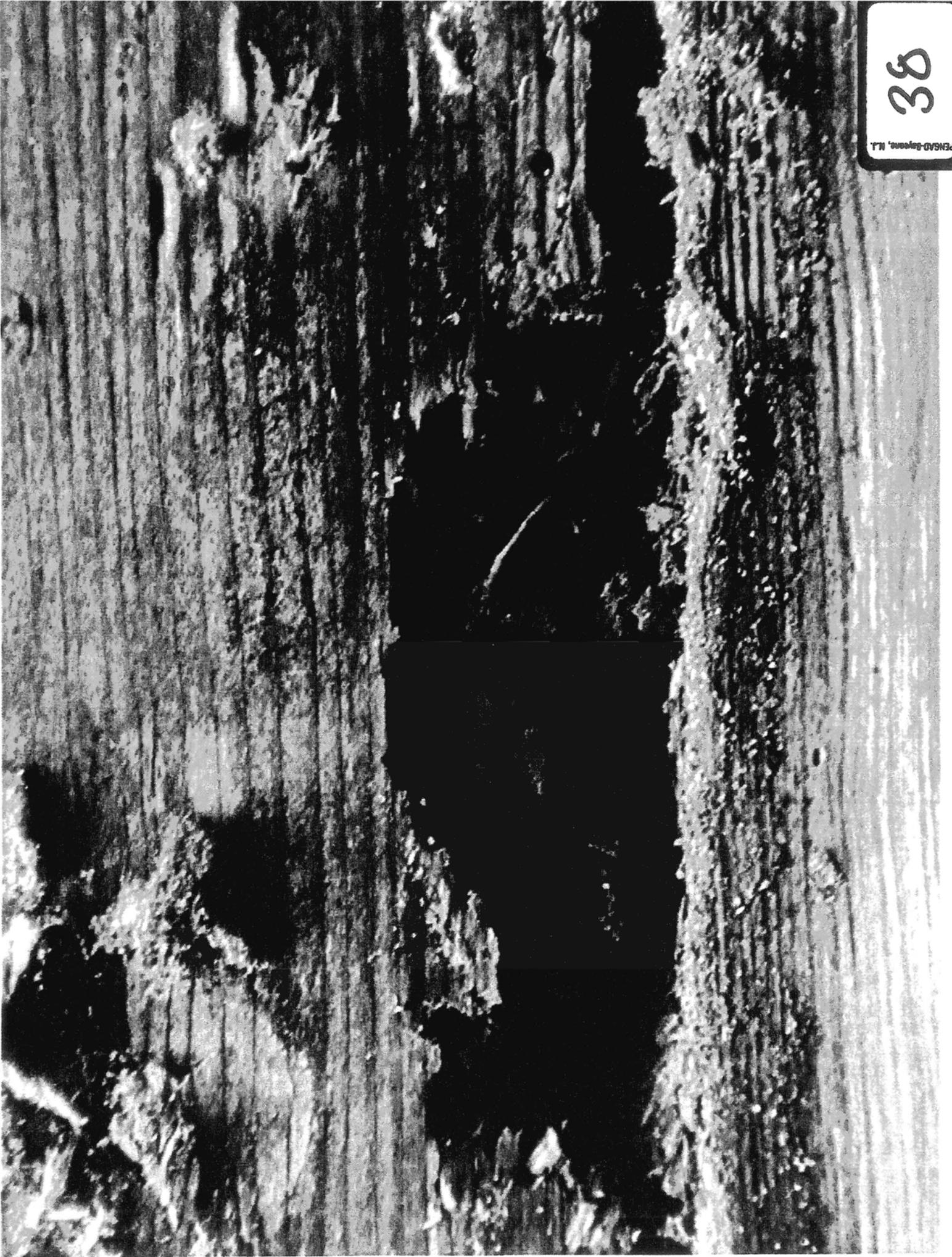
20 Gregory E. Thulin, WSBA #21752
21 Attorney for Defendants

ATTACHMENT C

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PENNSYLVANIA, N.Y.

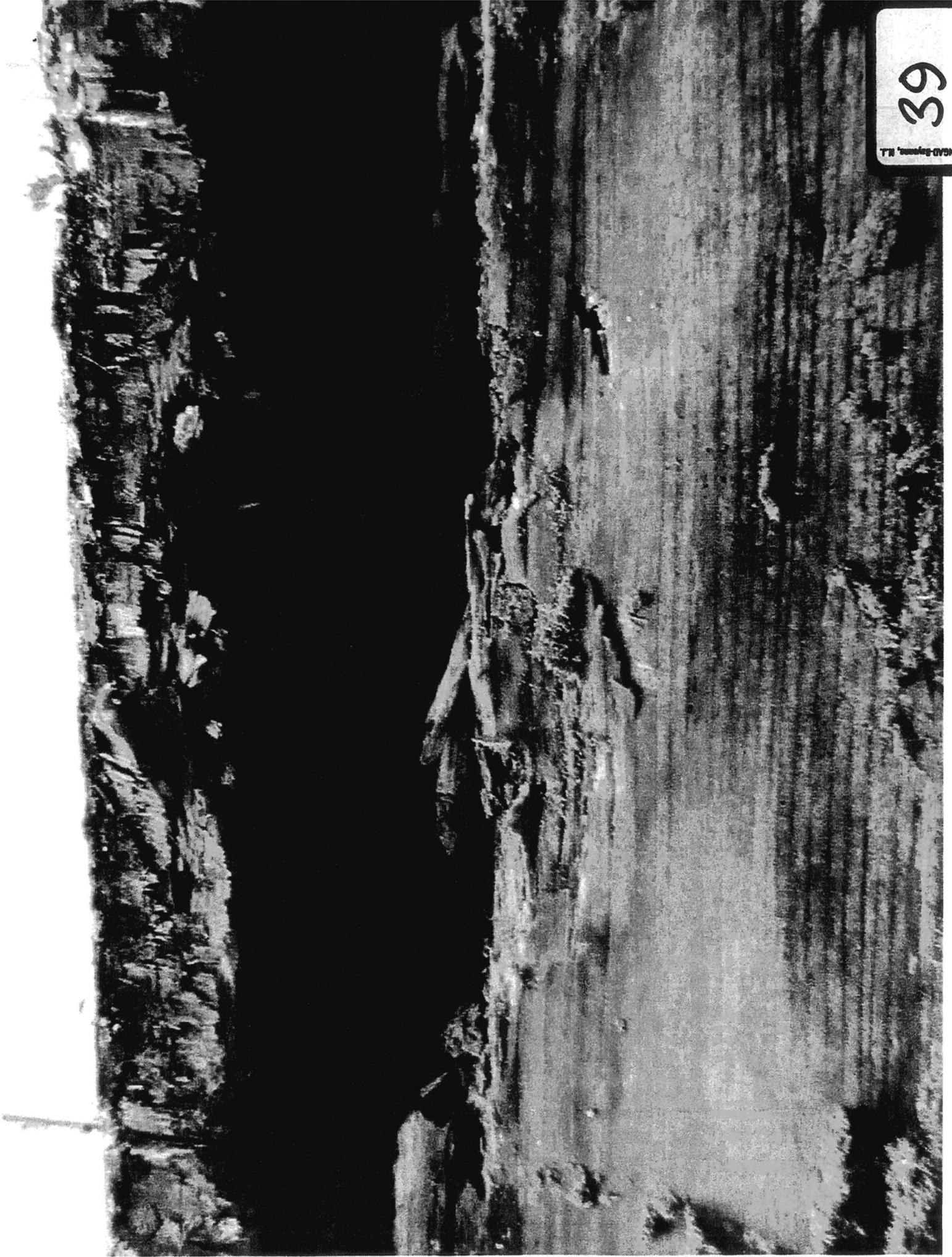




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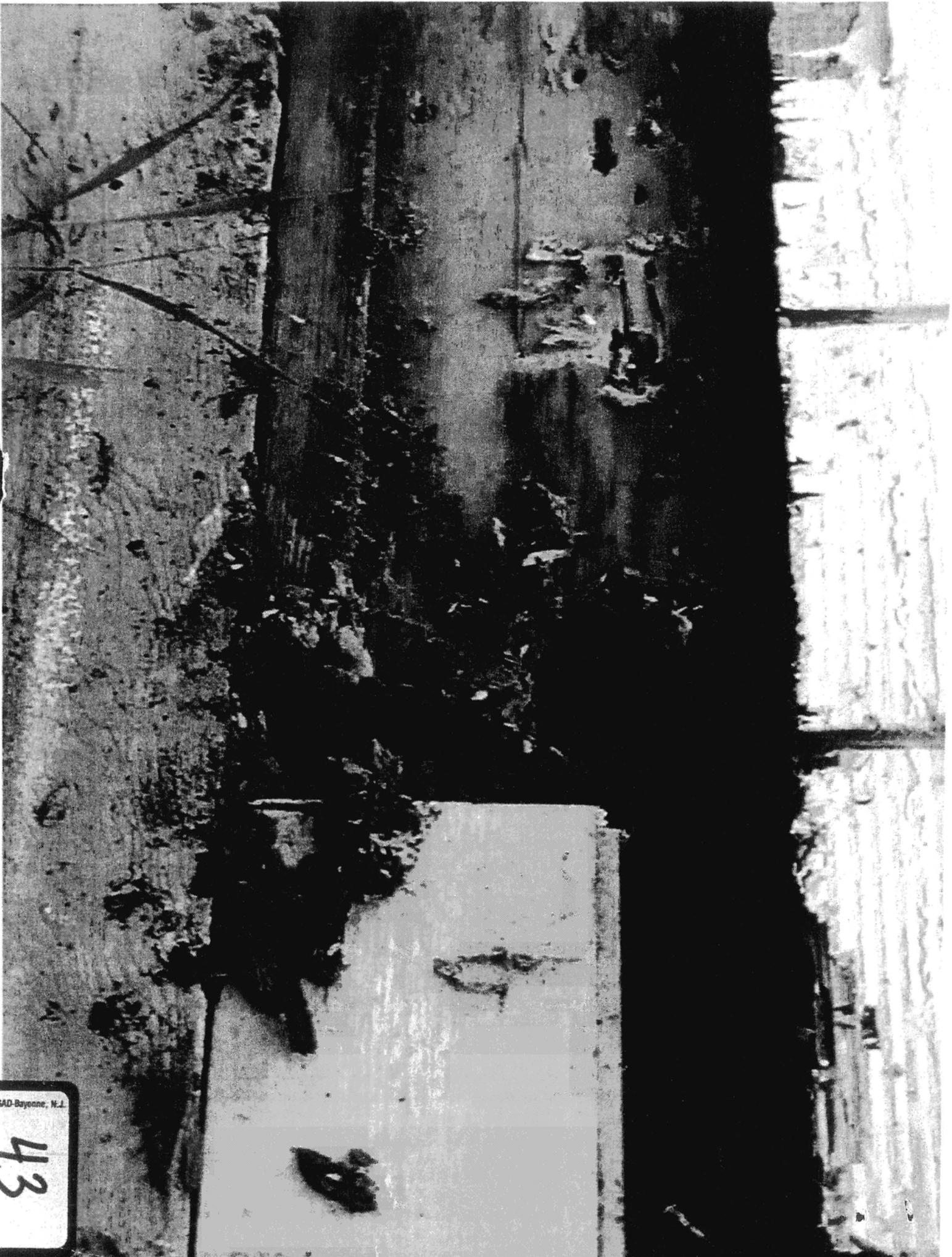
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