[Cite as *Nieberding v. Barrante*, 2021-Ohio-2593.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

THOMAS NIEBERDING, ET AL., :

Plaintiffs-Appellants, :

No. 110103

v. :

PAUL BARRANTE, ET AL., :

Defendants-Appellees. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: July 29, 2021

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-19-916403

Appearances:

Burkes Law, L.L.C., and John F. Burke, III, *for appellants* Thomas and Kathy Nieberding.

Costanzo & Lazzaro, P.L.L., and S. Robert E. Lazzaro, *for appellees* Russell Real Estate Services, Julie Thompson, and John E. Kukucz.

Wickens Herzer Panza, John A. Polinko, Malorie A. Alverson, and Michael R. Nakon, *for appellees* Paul Barrante and Barrante Holdings, L.L.C.

MARY J. BOYLE, A.J.:

{¶ 1} Plaintiffs-appellants, Thomas and Kathy Nieberding (collectively, "buyers"), claim that the sellers and the realtors involved in a residential real estate transaction failed to disclose material defects in the property. Defendants-appellees, Paul Barrante and Barrante Holdings, L.L.C. (collectively, "sellers") and defendants-appellees, Russell Real Estate Services, Julie Thompson, and John Kukucz (collectively, "realtors") filed motions for summary judgment on the buyers' claims, and the trial court granted their motions. The buyers appeal from these judgments, raising two assignments of error:

> 1. The trial court erred when it granted summary judgment to defendants-appellees Barrantes who were the owners/sellers of the property and who purposely failed to disclose the defects in the property.
>
> 2. The trial court erred when it granted summary judgment to the real estate defendants-appellees who were aware of the defects in the property but purposely did not disclose the defects to the buyers.

{¶ 2} Finding no merit to the assignments of error, we affirm.

I. Procedural History and Factual Background

{¶ 3} In 2015, the buyers purchased from the sellers a residential, waterfront property in the Vermillion Lagoons. The property contained a seawall, a vertical structure that ran along the land where the land met the lagoon. In 2017, the buyers filed a complaint against the sellers and the realtors, alleging that they failed to disclose material defects in the seawall, and in 2018, the buyers voluntarily dismissed their claims without prejudice.

{¶ 4} In June 2019, the buyers refiled their complaint. They brought claims against the sellers for fraud and fraudulent inducement. They also brought claims against their realtor (Thompson), the sellers' realtor (Kukucz), and Russell Real Estate Services (who employed both realtors) for fraud, fraudulent inducement, negligence, and unconscionable consumer sales practices in violation of R.C. 1345.03. The buyers sought compensatory damages for the cost of replacing the seawall, punitive damages, statutory damages, treble damages, and attorney fees.

{¶ 5} In July 2019, the realtors filed an answer and a motion for summary judgment. In the summary judgment motion, the realtors explained that the parties conducted extensive discovery in the first action before the buyers voluntarily dismissed it. They argued that they had no knowledge of any defect in the seawall, that the buyers could not have justifiably relied on their representations because they hired a professional inspector, the buyers purchased the property "as is," and the buyers' claims were barred by the doctrine of caveat emptor. The buyers moved to hold the summary judgment motion in abeyance until the parties conducted discovery.

{¶ 6} In August 2019, the sellers also filed an answer and a motion for summary judgment. The sellers argued that there were no material defects in the seawall, the sellers knew that the seawall was old and used its condition to negotiate a lower purchase price, and the buyers' claims were barred by the "as is" clause in the purchase agreement and the doctrine of caveat emptor. The trial court held the

summary judgment motions in abeyance and set a case management schedule with discovery deadlines.

{¶ 7} In January 2020, after the discovery deadlines had passed, the sellers and the realtors filed a joint renewed motion for summary judgment, which incorporated their previous summary judgment motions. The joint motion stated that the buyers had "completely failed to undertake any fact or expert discovery[.]" The buyers filed an opposition to the summary judgment motions, arguing that the seawall was defective, the defect was not disclosed and was not open and obvious, and the "as is" clause and caveat emptor do not bar their claims because the defendants engaged in fraud. The sellers and the realtors filed separate replies. In support of the summary judgment briefing, the parties relied on deposition testimony, documents exchanged in discovery in the first action, and affidavits.[1] A summary of the relevant evidence follows.

{¶ 8} The buyers each testified that they visited the property with Thompson twice in October 2015 before signing the purchase agreement. They knew that the property was over 60-years old and that the seawall was likely over 35-years old. Thomas Nieberding agreed that the property was "open to observation," that nothing was covering the deck, and that they had an "unimpeded opportunity to inspect the property." He testified that during the visits, they walked along the edge of the water but did not look over the edge of the deck to inspect the

[1] The realtors' motion for summary judgment cites to affidavits of Thomas and Kukucz, but these affidavits are not in our record.

seawall. He testified that from that vantage point, he "wasn't able to see the seawall." He agreed that if he were to look at the property from across the lagoon or from a boat on the water, he would have been able to see the seawall if the water level were low enough. He said that he could not "say for certain" what the water level is generally like in October but that in October 2017, it was "very high" because "we had a lot of rain."

{¶ 9} Thomas Nieberding testified that during one of the visits, Thompson pointed out "in passing" that there was rust on the posts that connected to the seawall. He explained that she "never" said that any work needed to be done. He said that he obtained a professional inspection for the house, but the inspection did not include the entire property because he "didn't believe it to be necessary." He also stated that they were able to negotiate a lower price for the property because the price per square foot was less for nearby properties. He denied that any reduction in price was due to the condition of the seawall.

{¶ 10} Thomas Nieberding explained that in the spring of 2016, after they purchased the property, a neighbor asked him if the sellers told him "about the wall," and he noticed that there were holes in the sheet of metal along the wall. He said that there were also erosion problems. He explained that the water near the property was only 28 inches deep, and it should be deeper than that. He admitted that he had no documents to support that the water depth was related to erosion. He testified that a few weeks before the December 2017 deposition, he and Kathy

began construction to rebuild the dock, including the seawall. The project proposal lists a total price of $54,000.

{¶ 11} Thompson testified that on the second visit to the property, she, the buyers, and the buyers' family members walked over to the dock, and she pointed out that the posts where a boat can be tied were "obviously old and needed painted." She said that she told them that "the metal piece on the edge was all rusted." She agreed that she and the buyers did not "lean over the edge [of the dock] or look at any holes" in the metal sheet on the seawall. Thompson said that the buyers had admired the patio and dock of one of the neighbors, so she sent the buyers an email with the name of the company that the neighbors had used to completely remodel their porch, patio, sidewalk, and dock.

{¶ 12} Thompson explained that the buyers wanted to offer below list price for the property based on the price per square foot of other nearby properties. She said that she told the buyers that she was going to "bring up" that "the posts needed painted and that there was some rust. We didn't discuss anything about holes." She testified that she discussed with the sellers' agent, Kukucz, that the seawall was old.

{¶ 13} Kukucz testified that the biggest issue in negotiating the price of the property was the seawall condition. Before the property transfer, he knew that the seawall was in "bad condition." He said that he had "walked to the edge of the seawall," looked down, and "could see holes in the wall." He explained that the wall was corrugated steel, and it was rusted. When asked why he did not suggest to the sellers that they disclose the holes in the residential property disclosure form,

Kukucz responded that "it's open" and "easily visible," and even if the seawall were not visible, the buyers "could still do an inspection and find it." He testified that he and the sellers had no knowledge of any erosion issues. He explained that "the only thing we discussed was that the seawall could have used repair. It wasn't imminent. It didn't need it then. It didn't need it two years later. It was still serving its purpose, but it wasn't brand new."

{¶ 14} Paul Barrante testified that he and his brother, Douglas, are equal members of Barrante Holdings, which obtained the property in 2013 after their father passed away. In an affidavit attached to the sellers' summary judgment motion, he averred that Barrante Holdings was the sole owner of the property and that he did not own the property in his individual capacity.[2] He said that in 2013, one of the neighbors told him that he needed to replace the seawall, but he did not follow up or find out why. Paul Barrante said that the seawall needed cosmetic updates because it was rusty. He testified that he knew that there were holes in the seawall "below the water or right at the water level," the seawall was rusted, and it was "plain to see" that the metal on the front of the seawall needed "some repair." He agreed that whether the seawall was observable from the land depended on the water level, but in October, the seawall would have been visible by standing on the dock and looking down. He also stated in his affidavit that the seawall "was fully visible" in October 2015 because the water level was low.

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[2] Although the realtors' affidavits are missing from the record, Paul Barrante's affidavit is in the record.

{¶ 15} Paul Barrante explained that despite the holes, the seawall was functional: "You can tie a boat to it. You can stand on the dock. [The dock] had no risk of failing." He said that he was not aware of any structural problems with the seawall, and he never noticed any erosion issues. He explained that he did not disclose the holes on the residential property disclosure form because he did not think that they were a defect. He testified that the sellers agreed to lower the purchase price of the property by $39,900 because the buyers said the seawall needed "some repairs," but "nothing specific was mentioned." He also stated in his affidavit that "[o]ne of the reasons for this significant price decrease was due to the age and condition of the sea wall located on the property."

{¶ 16} Douglas Barrante testified that he had been to the property only a "very few" times. He explained that he observed the seawall from the water, but he did not recall seeing any holes. He said that the seawall was "ugly" and "had some corrosion, rust," but that it did "its purpose" of holding "the material from the ground flowing into the lagoon." He explained that when the neighbor said they needed to replace the seawall in 2013, the conversation "prompt[ed] us to take a look at the wall, and we determined that it was not an attractive wall, but no need to replace it." He recalled that in 2015, "there was a discussion about reducing the price because the potential buyers did not like the appearance of the seawall and they wanted to replace it."

{¶ 17} In October 2020, the trial court granted both motions for summary judgment with an opinion. It is from this judgment that the buyers timely appeal.

II. Law and Analysis

{¶ 18} In their two assignments of error, the buyers argue that the trial court erred when it granted the sellers' and the realtors' motions for summary judgment because genuine questions of material fact remain as to whether they purposefully failed to disclose defects in the property. We will first address the buyers' claims against the sellers, followed by the buyers' claims against the realtors.

{¶ 19} We review a trial court's judgment granting a motion for summary judgment de novo. *Citizens Bank, N.A. v. Richer*, 8th Dist. Cuyahoga No. 107744, 2019-Ohio-2740, ¶ 28. Thus, we independently "examine the evidence to determine if as a matter of law no genuine issues exist for trial." *Brewer v. Cleveland Bd. of Edn.*, 122 Ohio App.3d 378, 383, 701 N.E.2d 1023 (8th Dist.1997). We therefore review the trial court's order without giving any deference to the trial court. *Citizens Bank* at ¶ 28. "On appeal, just as the trial court must do, we must consider all facts and inferences drawn in a light most favorable to the nonmoving party." *Glemaud v. MetroHealth Sys.*, 8th Dist. Cuyahoga No. 106148, 2018-Ohio-4024, ¶ 50.

{¶ 20} Pursuant to Civ.R. 56(C), summary judgment is proper where (1) "there is no genuine issue as to any material fact," (2) "the moving party is entitled to judgment as a matter of law," and (3) "reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made." *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978). Trial courts should award summary judgment only after resolving all doubts in favor of the nonmoving party and finding that

"reasonable minds can reach only an adverse conclusion" against the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359, 604 N.E.2d 138 (1992).

A. The Buyers' Claims Against the Sellers

{¶ 21} The buyers brought claims against the sellers for fraud and fraudulent inducement, arguing that the holes in the metal sheet on the seawall rendered the seawall defective and that the sellers knew about and failed to disclose the defect. The buyers maintain that summary judgment was inappropriate because two genuine issues of material fact remain: (1) "whether the defective sea wall was readily observable and thus open and obvious," and (2) "whether the price of the house was negotiated down due to the defective sea wall."

{¶ 22} To succeed on their fraud claims, the buyers must establish the following elements: (1) a representation of fact (or where there is a duty to disclose, concealment of a fact); (2) that is material to the transaction at issue; (3) made falsely, with knowledge of its falsity or with utter disregard and recklessness as to whether it is true or false; (4) with the intent of misleading another into relying upon it; (5) justifiable reliance upon the misrepresentation (or concealment); and (6) resulting injury proximately caused by the reliance. *Cohen v. Lamko, Inc.*, 10 Ohio St.3d 167, 169, 462 N.E.2d 407 (1984).

{¶ 23} R.C. 5302.30(C) and (D) require sellers of residential real estate to complete a residential property disclosure form disclosing "material matters relating to the physical condition of the property" and "any material defects in the

property" that are "within the actual knowledge" of the seller. "Each disclosure of an item of information that is required to be made in the property disclosure form * * * and each act that may be performed in making any disclosure of an item of information shall be made or performed in good faith." R.C. 5302.30(E)(1). "Good faith" means "honesty in fact." R.C. 5302.30(A)(1). If the seller fails to disclose a material fact on the form with the intent to mislead the buyer, and the buyer relies on the form, the seller may be liable for any resulting injury. *Pedone v. DeMarchi*, 8th Dist. Cuyahoga No. 88667, 2007-Ohio-6809, ¶ 31. But where the buyer "has had the opportunity to inspect the property, he is charged with knowledge of the conditions that a reasonable inspection would have disclosed." *Nunez v. J.L. Sims Co., Inc.*, 1st Dist. Hamilton No. C-020599, 2003-Ohio-3386, ¶ 17. "[T]he duty to conduct a full inspection falls on the purchasers[,] and the disclosure form does not function as a substitute for such careful inspection." *Roberts v. McCoy*, 2017-Ohio-1329, 88 N.E.3d 422, ¶ 17 (12th Dist.).

{¶ 24} The buyers contend that there are genuine issues of material fact regarding whether the following disclosures in the residential property disclosure form constituted material, fraudulent misrepresentations:

> E) STRUCTURAL COMPONENTS (FOUNDATION, BASEMENT/ CRAWLSPACE, FLOORS, INTERIOR AND EXTERIOR WALLS): Do you know of any previous or current movement, shifting, deterioration, material cracks/settling (other than visible minor cracks or blemishes) or other material problems with the foundation, basement/crawl space, floors, or interior/exterior walls?
>
> No.

J) FLOOD PLAIN/LAKE ERIE COASTAL EROSION AREA: Is the property located in a designated flood plain?

Yes.

Is the property or any portion of the property included in a Lake Erie Coastal Erosion Area?

Unknown.

K) DRAINAGE/EROSION: Do you know of any previous or current flooding, drainage, settling, or grading or erosion problems affecting the property?

No.

N) OTHER KNOWN MATERIAL DEFECTS: The following are other known material defects in or on the property:

[Blank]

{¶ 25} With respect to the sellers' representations regarding erosion, there is no genuine dispute that there is no evidence that the sellers knew about any erosion problems at the property. Thomas Nieberding testified that the property had an erosion problem because the "depth of our water was 28 inches." But he had no documents to show that the water depth was related to the performance of the seawall, and the buyers presented no expert report identifying an erosion problem. The buyers also point to no evidence suggesting that the sellers knew about any erosion issues. Paul Barrante testified that he had never noticed any issues with erosion near the seawall and that he "didn't think there was any erosion into the lagoon that we could tell." Kukucz testified that he and the sellers "never discussed erosion because there was none to my knowledge, to his knowledge, or anybody

else's knowledge." He explained that the water depth has less to do with erosion and more to do with the lagoons needing to be dredged to prevent sediment buildup.

{¶ 26} The rest of the nondisclosures relate to the holes in the sheet of metal on the front of the seawall. The evidence shows that the seawall's condition is undisputed. Everybody, including the buyers, testified that they knew the seawall was "old" and that it was rusted. The sellers and Kukucz testified that they knew the seawall had holes in the metal before selling the property, and the buyers and Thompson testified that they did not know about the holes until after the purchase. Thomas Nieberding testified that he was not alleging any design or structural defect with the seawall, but rather he was "complaining" about the holes in the metal.

{¶ 27} The crux of the parties' dispute is whether the holes in the seawall were "material defects" that the sellers needed to disclose. Thomas Nieberding testified that the sellers should have disclosed the holes in the seawall. Paul Barrante testified that the holes in the seawall were not a defect in the property because the seawall still functioned, and he "did not realize that that was something that needed to be" disclosed.

{¶ 28} However, when looking to the definition of "material defect," no reasonable person could consider the holes in the seawall metal to be a "material defect" requiring disclosure. The disclosure form states the following:

> For purposes of this section [Section N], material defects would include any non-observable physical condition existing on the property that could be dangerous to anyone occupying the property or any non-observable physical condition that could inhibit a person's use of the property.

{¶ 29} We recognize that the parties dispute whether the holes were "observable." But even construing the evidence in the buyers' favor to find that the holes were "non-observable," there is no genuine dispute of material fact that the holes in the metal did not render the seawall "dangerous to anyone occupying the property" and did not "inhibit a person's use of the property." The buyers have not alleged and produced no evidence or expert report to show that the seawall was dangerous. Every deponent, including the buyers, agreed that the seawall did not need immediate repair or replacement. The seawall was not collapsing. Boats could be tied to it. There were no problems with the concrete or deck. The buyers did not repair or replace the seawall until over two years after they purchased the property, when they replaced the dock. There is no evidence in the record that the buyers could not use the seawall or that the condition of the seawall made the property dangerous. Accordingly, the holes did not render the seawall materially defective, and the sellers had no obligation to disclose the holes on the disclosure form. The sellers therefore made no material, fraudulent misrepresentations or omissions with the intent of misleading the buyers, and we need not address the remaining fraud elements of justifiable reliance and damages.

{¶ 30} Furthermore, the doctrine of caveat emptor bars the buyers' claims. Caveat emptor prevents a purchaser from recovering for a structural defect to the property if the following elements are satisfied: "(1) the condition complained of is open to observation or discoverable upon reasonable inspection; (2) the purchaser had the unimpeded opportunity to examine the premises; and (3) there is no fraud

on the part of the vendor." *Layman v. Binns*, 35 Ohio St.3d 176, 519 N.E.2d 642 (1988), syllabus. Caveat emptor "is designed to finalize real estate transactions by preventing disappointed real estate buyers from litigating every imperfection existing in residential property." *Thaler v. Zovko*, 11th Dist. Lake No. 2008-L-091, 2008-Ohio-6881, ¶ 31. But "a seller may still be liable to a buyer if the seller fails to disclose known latent conditions." *Morgan v. Cohen*, 8th Dist. Cuyahoga No. 107955, 2019-Ohio-3662, ¶ 35.

{¶ 31} Even when we construe the evidence in the buyers' favor and find that the holes in the seawall were not open to observation because of the water level, there is no dispute that the holes would have been discoverable upon reasonable inspection and that the buyers had the opportunity to examine the seawall. The buyers had a professional inspection conducted on the house but chose not to have the seawall professionally inspected even though they had the opportunity to do so. The buyers also visited the property twice and testified that nobody impeded their ability to examine the property. And as previously discussed, we find that there was no fraud on the part of the sellers. Accordingly, under the doctrine of caveat emptor, the buyers cannot recover damages for alleged defects to the seawall.

{¶ 32} The buyers argue that summary judgment should have been denied based on *Layman*, 35 Ohio St.3d 176, 519 N.E.2d 642, which the trial court cited in its opinion for the elements of caveat emptor, because the holes in the seawall were not open and obvious, and the sellers and realtors engaged in fraud. In *Layman*, steel beams were supporting a defective basement wall, and the beams were open to

observation. *Id.* at 178-179. Unlike the beams in *Layman*, the buyers contend that the holes in the seawall metal were not open to observation because of the water level and vantage point from the dock. However, the Ohio Supreme Court explained that the first element of caveat emptor is that the defect is "open to observation *or discoverable on reasonable inspection*." (Emphasis sic.) *Id.* at 177. Although the holes in the seawall were not open to observation if we construe the evidence in the light most favorable to the buyers, the holes were discoverable on reasonable inspection. And like in *Layman*, there is no evidence here that the sellers (or realtors, as discussed below) engaged in fraud.

{¶ 33} Lastly, the "as is" clause in the purchase agreement also protects the sellers from liability for not disclosing the holes in the seawall. When a purchase agreement states that the property is being sold "as is," the buyer "agrees to make his or her own appraisal of the bargain and accept the risk that he or she may be wrong." *McDonald v. JP Dev. Group, L.L.C.*, 8th Dist. Cuyahoga No. 99322, 2013-Ohio-3914, ¶ 15. "An 'as is' clause in a real estate purchase agreement relieves a seller of the duty to disclose latent defects and precludes a claim against a seller based on 'passive' nondisclosure." *Morgan*, 8th Dist. Cuyahoga No. 107955, 2019-Ohio-3662, at ¶ 39. But it does not protect a seller from liability for "positive" acts of fraud, i.e., "'a fraud of commission rather than omission,'" such as fraudulent misrepresentation or fraudulent concealment, including fraudulent misrepresentations in a residential property disclosure form. *Brown v. Lagrange Dev. Corp.*, 6th Dist. Lucas No. L-09-1099, 2015-Ohio-133, ¶ 20, quoting *Majoy v.*

Hord, 6th Dist. Erie No. E-03-037, 2004-Ohio-2049, ¶ 18. The purchase agreement in this case states at least seven times that the buyers are purchasing the property "as is." And, again, we have found the sellers did not engage in fraud.

{¶ 34} The buyers rely on *Shannon v. Fischer*, 12th Dist. Clermont No. CA2020-05-022, 2020-Ohio-5567, for the proposition that a seller is liable for failing to fully disclose "latent and patent defects" despite an "as is" clause. In *Shannon*, the Twelfth District found that there was a genuine issue of material fact as to whether the sellers fraudulently misrepresented the extent of water damage in the property's basement. *Id.* at ¶ 55. The sellers disclosed that they had water damage due to a sump pump malfunction, fixed the issue, and had no water problems since then. *Id.* at ¶ 3. Less than two weeks after closing, the buyers discovered water intrusion in the basement coming from multiple window wells and a door. *Id.* at ¶ 6. Drywall had covered the areas before the transaction, and the sellers represented that the drywall was to repair damage caused by a pool que. *Id.* at ¶ 4. When the buyers hired professional water and mold remediation services, they discovered a black mold infestation. *Id.* at ¶ 6. There was no question that "[w]hether the basement had water issues and from what cause, which was a specific question on the residential form" was "material." *Id.* at ¶ 35. Therefore, the "as is" clause did not entitle the sellers to summary judgment because there was a question of fact as to whether the sellers fraudulently concealed the extent of the water damage and mold. *Id.* at ¶ 51-56.

{¶ 35} We agree with the law as stated in *Shannon* and in the other cases the buyers identify for the proposition that a seller must fully disclose latent, material defects. But the case here is factually distinguishable because the holes in the metal sheeting are not "material" defects. In *Shannon*, the defects the sellers allegedly failed to disclose — excessive water damage and a black mold infestation — were clearly "material" defects that were dangerous to anyone occupying the property and that inhibited the occupant's use of the property, and a question of fact existed as to whether the sellers fraudulently misrepresented the damage. But here, as previously discussed, there is no evidence to suggest that the holes in the metal sheeting of the seawall were "material," and the fraud analysis therefore ends.

{¶ 36} The buyers also cite a string of cases that they assert (without any analysis) "compel a finding" that the trial court should have denied the summary judgment motions. Some of these cases involve situations where evidence was presented to show that the sellers physically hid defects in the property. *See Southworth v. Weigand*, 8th Dist. Cuyahoga No. 80561, 2002-Ohio-4584, ¶ 25-27 (evidence that wallpaper had been placed, the ceiling had been painted, and carpet had been installed to cover water stains); *Felty v. Kwitkowski*, 8th Dist. Cuyahoga No. 68530, 1995 Ohio App. LEXIS 4834, 9-11 (Nov. 2, 1995) (evidence that support wall was built in front of foundation in basement); *Harris v. Burger*, 8th Dist. Cuyahoga No. 68303, 1995 Ohio App. LEXIS 3465, 8 (Aug. 24, 1995) ("It can also be inferred from the extensive nature of the cracks that appellees covered the cracks to conceal them, not to merely repair them."). These cases are not applicable here.

There is no evidence that the sellers tried to physically hide the seawall from the buyers to prevent them from discovering the holes in the metal sheet.

{¶ 37} Two of the cases the buyers cite involve false statements. *See Shumney v. Jones*, 8th Dist. Cuyahoga No. 63019, 1992 Ohio App. LEXIS 3463, 3-4 (July 2, 1992) (seller stated the basement did not leak, buyer presented evidence that water problems were "long standing," and a question of fact therefore existed as to whether the seller fraudulently misrepresented the water issue); *Vitanza v. Bertovich*, 8th Dist. Cuyahoga No. 64699, 1993 Ohio App. LEXIS 5730 (Dec. 2, 1993) (caveat emptor did not apply because water leakage in basement was not open to observation nor easily discoverable, and sellers assured the buyers there was no water in the basement, which terminated the buyers' duty to inspect). These cases are likewise distinguishable because the buyers in this case argue that the sellers failed to disclose the holes, not that they represented that no holes existed or that the seawall was in great condition.

{¶ 38} Lastly, the buyers cite to *Ferguson v. Cadle*, 5th Dist. Richland No. 2008 CA 0077, 2009-Ohio-4285, ¶ 25, in which the Fifth District found that a steel support system inside a basement wall was not reasonably discoverable. The buyers appear to be comparing the support beams inside of a wall to the holes on the metal sheet on the front of the seawall. But the holes in the seawall are more like the alleged roof defect in *Smith v.* Cooper, 4th Dist. Gallia No. 04CA12, 2005-Ohio-2979, ¶ 14. In *Smith*, the Fourth District found that caveat emptor applied and the sellers did not conceal problems with the roof because "[e]ven if appellant could not

personally inspect the roof, he could have retained an inspector or knowledgeable persons to perform an inspection." *Id.* at ¶ 14. The court explained that "[s]imply because a roof is not open to inspection from the ground, or because a potential buyer is physically unable to inspect a roof, this does not mean that sellers are concealing any problems associated with the roof." *Id.* Likewise, even construing the evidence in favor of the buyers that they could not see the holes in the seawall from where they were standing on the dock, the evidence shows that they could have looked at the seawall from across the river, viewed the seawall from a boat in the water, or hired a professional inspector to examine the seawall.

{¶ 39} We agree with the buyers that genuine issues of fact exist regarding whether the seawall was observable from standing on top of the dock in October 2015 and whether the condition of the seawall was a major part of the negotiation of the sale price. However, these genuine issues of fact are not material to the pertinent issues here because regardless of whether the seawall condition was observable and whether the buyers knew about the condition and used it as leverage to reduce the price of the property, there is no genuine dispute of fact that the holes in the metal sheet on the seawall were not "material defects" that the sellers needed to disclose. There is no evidence in the record that the sellers made any material, fraudulent misrepresentations or omissions with the intent of misleading the buyers, and the buyers therefore cannot establish their fraud claims against the sellers as a matter of law.

{¶ 40} Accordingly, following a thorough, independent review of the record, we find that there is no genuine issue of material fact, the sellers are entitled to judgment as a matter of law on the buyers' fraud claims, and reasonable minds can come to but one conclusion in favor of the sellers.[3] Therefore, the trial court did not err in granting the sellers' motion for summary judgment, and we overrule the buyers' first assignment of error.

B. The Buyers' Claims Against the Realtors

{¶ 41} The buyers brought claims against the realtors for fraud, fraudulent inducement, negligence, and violations of R.C. 1345.03, part of Ohio's Consumer Sales Practices Act ("CSPA"). The buyers argue that the realtors failed to disclose the defects in the seawall and failed to instruct the sellers to disclose the defects.

{¶ 42} As to the alleged CSPA violations, the trial court did not err in granting summary judgment in favor of the realtors because the CSPA does not apply to "pure" real estate transactions. *Brown v. Liberty Clubs, Inc.*, 45 Ohio St.3d 191, 193, 543 N.E.2d 783 (1989). "'The CSPA, which is contained in R.C. Chapter 1345, prohibits unfair or deceptive acts and unconscionable acts or practices by suppliers in consumer transactions.'" *U.S. Bank v. Amir*, 8th Dist. Cuyahoga No. 97438, 2012-Ohio-2772, ¶ 42, quoting *Colburn v. Baier Realty & Auctioneers*, 11th Dist. Trumbull No. 02-T-0161, 2003-Ohio-6694, ¶ 13. Although the CSPA applies

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[3] The parties dispute whether Paul Barrante can be personally liable for the sellers' claims because he was a member of Barrante Holdings, he did not personally own the property, but he signed the purchase agreement and disclosure form. Because we have found that the buyers cannot establish their fraud claims against the sellers at all, we need not address these arguments.

to "the personal property or services portion of a mixed transaction involving both the transfer of personal property or services and the transfer of real property," it does not apply to "collateral services" that are associated only with the sale of real estate. *Brown* at syllabus. Here, the realtors performed collateral services associated with the sale of the property, and thus, the CSPA does not apply. *See Hurst v. Ent. Title Agency*, 157 Ohio App.3d 133, 2004-Ohio-2307, 809 N.E.2d 689, ¶ 35 (11th Dist.) (CSPA was inapplicable where "[t]he appellees merely were acting as an intermediary to effectuate the sale of the real estate.").

{¶ 43} Regarding the fraud and negligence claims, the buyers admitted in their depositions that they had no facts to show that any of the realtors made any false or misleading statements, that the realtors engaged in fraud, or that the realtors "did anything wrong." The buyers have pointed to no such evidence in subsequent briefing. In their appellate brief, they cite to their complaint to support their assertions that the realtors had a duty to disclose the defects but failed to do so, but allegations in pleadings are not evidence. *Deutsche Bank Natl. Trust Co. v. Najar*, 8th Dist. Cuyahoga No. 98502, 2013-Ohio-1657, ¶ 26.

{¶ 44} The record also reflects no evidence that would establish that the realtors were liable for fraud or negligence. The disclosure form provides that "[t]he statements contained in this form are made by the owner and are not the statements of the owner's agent or subagent," and there is no testimony that the realtors helped the sellers complete this form. The realtors therefore could not be liable for the representations or omissions in that document. The buyers also admitted that they

had no direct communication with the sellers' agent, Kukucz, or his employer, Russell Real Estate Services. Although Kukucz testified that he knew there were holes in the metal sheet on the seawall, no duty exists "between agents of the seller and potential or actual purchasers." *James v. Partin*, 12th Dist. Clermont No. CA2001-11-086, 2002-Ohio-2602, ¶ 20, citing *Miles Realty One*, 8th Dist. Cuyahoga No. 69506, 1996 Ohio App. LEXIS 1889, 11 (May 9, 1996). The buyers' agent, Thompson, testified that she did not know that the seawall had holes until the buyers contacted her after the transaction.

{¶ 45} Accordingly, after our de novo review, we find that the trial court did not err in granting the realtors' motion for summary judgment, and we overrule the buyers' second assignment of error.

{¶ 46} Judgment affirmed.

It is ordered that appellees recover from appellants the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, ADMINISTRATIVE JUDGE

SEAN C. GALLAGHER, J., and
LARRY A. JONES, SR., J., CONCUR