STATE OF MICHIGAN

COURT OF APPEALS

HEART OF THE NORTH, INC.,

Plaintiff-Appellee,

v

ANNA MCCULLEN LUTZ,

Defendant/Cross-Defendant-Appellee,

and

DANIEL RAY COSTELLO and CAROL N. COSTELLO,

Defendants/Cross-Plaintiffs-Appellants.

UNPUBLISHED
March 11, 2004

No. 245338
Crawford Circuit Court
LC No. 99-004822-CK

Before: Sawyer, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

Defendants/cross-plaintiffs Daniel and Carol Costello appeal by right the trial court's order, following a bench trial, dismissing their claims for breach of contract, misrepresentation, and statutory liability for environmental remediation concerning a fuel oil spill that had occurred on their property before they purchased it. Defendant/cross-defendant Anna Lutz owned the property at the time of the spill.[1] We affirm.

"We review the trial court's findings of fact in a bench trial for clear error and conduct a review de novo of the court's conclusions of law." *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction after a review of the

[1] Plaintiff's liability is only collaterally implicated and is not addressed in this opinion. Plaintiff is the title company involved in the Costellos' purchase of the property in question from Christopher and Traci Whitburn, who purchased the property from Lutz.

entire record that a mistake has been made. *Radloff v Michigan (On Remand)*, 136 Mich App 457, 459; 356 NW2d 31 (1984).

We initially note that plaintiffs argue that they are entitled to recovery under a breach of contract claim as third party beneficiaries and that they are entitled to enforcement of the contract between Lutz and the Whitburns on a theory of promissory estoppel. The Costellos did not allege these theories of liability in their pleadings or properly present them to the trial court. Issues that are first raised on appeal are not ordinarily subject to review by this Court. *Booth Newspapers, Inc v University of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). Because these theories were never raised below, we decline to review them.

The Costellos argue that the trial court erred in its factual findings when it determined that they had not established a cause of action against Lutz for innocent misrepresentation. We disagree. "A claim of innocent misrepresentation is shown if a party detrimentally relies upon a false representation in such a manner that the injury suffered by that party inures to the benefit of the party who made the representation." *M & D, Inc v WB McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998). This cause of action eliminates the need to prove fraudulent purpose or intent; but it adds the requirements that the misrepresentation was made in connection with the creation of a contract, the injury suffered inured to the benefit of the party making the misrepresentation, and the parties were in privity of contract. *Id*. at 27-28. The Costellos here did not show that they reasonably relied on the Lutz-Whitburn contract, nor did they show that they were privy to that contract. Therefore, the trial court decision on their claim was not clearly erroneous.

The Costellos next assert that the trial court erred when it determined that the Whitburns had completed their contract with Lutz at the time of the sale to the Costellos and, therefore, had no rights of indemnification for clean-up to assign. We disagree. "Full performance of a duty under a contract discharges the duty." 2 Restatement Contracts, 2d, § 235, p 211. Here, it was not clearly erroneous for the trial court to factually determine that there was no contract in existence after the closing, which constituted full performance of the Lutz-Whitburn contract. Therefore, the Whitburns could not have assigned any rights against Lutz under the contract to plaintiffs.

The Costellos' final argument is that the former Michigan Environmental Response Act (MERA), MCL 299.601 *et seq.*, governs this lawsuit, not the Natural Resources and Environmental Protection Act (NREPA), MCL 324 *et seq.*, and, further, that the trial court erred when it determined that Lutz was not liable for response activity costs under either statute. We disagree on both fronts.

The applicable law here is the NREPA because the suit was filed after May 1, 1995. See MCL 324.20102a(1)(a). Contrary to the Costellos' assertion, although preserving a claim for liability, MCL 324.102 does not preclude application of the NREPA. Cf. *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1; 596 NW2d 620 (1999).

Under the NREPA, unless an exception applies a facility owner is liable if the owner was responsible for an activity causing a release. See MCL 324.20126(1)(b). MCL 324.20126(3)(f) allows an owner of a property to escape liability if the property is residential and the spill was consistent with the residential use of the property. We find that the trial court did not clearly err

in its determination that the property was used for residential purposes and that the spill of fuel oil to heat the house on the property was consistent with this use. Plaintiff offers no authority for the contention that whether real property is residential is a matter of zoning rather than use.

We affirm.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Richard A. Bandstra