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STATE OF MICHIGAN

COURT OF APPEALS

ROGER LEWIS and NICOLE SUSSER,

Plaintiffs/Counterdefendants-Appellants,

v

ROBERT BLUMBERG,

Defendant/Counterplaintiff-Appellee.

UNPUBLISHED
October 23, 2026
11:02 AM

No. 373967
Oakland Circuit Court
LC No. 2021-185932-CH

Before: GADOLA, C.J., and O'BRIEN and MARIANI, JJ.

PER CURIAM.

Plaintiffs/counterdefendants (plaintiffs) entered into an agreement with defendant/counterplaintiff (defendant) to buy defendant's home. When the sale did not occur as provided in the agreement, plaintiffs filed the instant lawsuit claiming breach of contract and seeking specific performance. After efforts to settle the matter failed, defendant countersued, alleging among other things that plaintiffs breached the agreement. The matter proceeded to trial on liability, and a jury concluded that defendant did not breach the agreement, but plaintiffs did; a bench trial was then held on damages, resulting in an award of monetary damages and equitable relief in favor of defendant. Plaintiffs now appeal by right, raising numerous challenges to the jury's verdict against them and the trial court's subsequent award of damages. We agree with plaintiffs that the trial court reversibly erred by allowing the admission of the parties' settlement efforts under MRE 408 and by refusing to instruct the jury on the doctrine of anticipatory repudiation. As a result of these errors, the liability and damages judgments against plaintiffs must be vacated and the matter remanded for further proceedings consistent with this opinion.

I. BACKGROUND

A. THE AGREEMENT TO PURCHASE DEFENDANT'S HOME

In November 2020, plaintiffs were looking for a new home to accommodate their growing family. On November 22, 2020, they entered into a Purchase Agreement (PA) with defendant to buy his house in Franklin Village (the Property) for $1,275,000. The PA specified that closing

would take place between January 11 and 15, 2021,[1] and that defendant "shall deliver occupancy and possession of the [P]roperty . . . IMMEDIATELY AFTER CLOSING." The PA also provided, among other things, that plaintiffs were "purchas[ing the Property] in an 'AS-IS CONDITION,' subject only to," as relevant here, "the right of a property inspection as provided" in the PA. That right, set forth in Paragraph 10 of the PA, allowed plaintiffs' purchase offer to be made contingent upon an independent inspection of the Property within seven days of the PA's effective date. Plaintiffs would then have two days to notify defendant if they were "dissatisfied with the inspection results"; if they did not provide such notice, then "the sale shall be consummated as specified" in the PA, but if they did, then plaintiffs would have the option of declaring the PA "null and void" and receiving their deposit back, or requesting that defendant remedy the identified defect(s). Upon receiving such a request, defendant would have five days to respond. If defendant "declare[d] an unwillingness to repair or provide for repairs," plaintiffs would have the option to either "accept [the Property] 'as is' or declare [the PA] null and void" with "all earnest money . . . returned to" them.[2]

As detailed through the evidence and testimony presented at trial, it did not take long after the signing of the PA for issues between the parties to arise. The parties agreed to extend the deadline for the inspection of the Property to December 4, 2020. An inspection then occurred and, although there is some uncertainty as to whether it happened on December 2 or December 3, defendant confirmed at trial that it was timely under the extension. According to plaintiffs, the inspection identified "major issues" with the Property, which prompted them to request a $150,000 reduction of the purchase price. Defendant rejected this request as well as plaintiffs' subsequent requests for $75,000 and then $35,000 off the purchase price. Defendant testified that the reduction requests angered him and made him want to get out of the deal with plaintiffs.[3] Defendant also testified that both he and his realtor believed plaintiffs missed their deadlines under Paragraph 10 of the PA and, as a result, the PA was "null and void."

On December 6, defendant signed a "Mutual Release of Purchase Agreement" prepared by his realtor. In short, the agreement would cancel the PA, and plaintiffs' earnest money deposit would be returned to them. As described by defendant's realtor at trial, the agreement meant that "[e]verybody signs off and says this deal is no longer." Defendant's realtor sent this document to plaintiffs' agent for signature. Plaintiffs did not sign the document. On December 7, a representative from plaintiffs' real-estate brokerage contacted defendant's realtor to inform him

[1] The PA lists the year for the closing date as "2020" rather than "2021." This, however, is plainly a typographical error given that the PA was signed in November 2020, and it is undisputed that the PA set the closing period for January 2021.

[2] The PA provided check boxes to designate that the purchase offer was or was not contingent on such an inspection. Confusingly, and contradictorily, both boxes on the PA are checked. At trial, plaintiffs' real-estate attorney confirmed that "the parties acted in conformity with [the sale] being contingent," and defendant also affirmed this understanding.

[3] Defendant's realtor testified that he had informed plaintiffs' initial real-estate agent that defendant welcomed an inspection but did not want further negotiations on the purchase price since it was already below his listing price for the Property.

that plaintiffs wanted to purchase the Property "as is." The next morning, defendant's realtor relayed this information to defendant, and then told plaintiffs' brokerage that he did not believe that an "as is" purchase was going to be possible.

Issues also arose regarding defendant's ability to convey clear title. The parties' respective title-commitment investigations revealed that defendant's ex-wife was still listed on the title to the Property. Defendant's attorney advised defendant that, because the ex-wife was on the title but was not a signatory to the PA, the PA was "unenforceable." Defendant told his realtor that this cloud on the Property's title "appear[ed] to solve [his] situation as to escaping the current contract" and that, while the PA would "not be used to sell the [Property]" per his attorney's advice, he would be willing to sell the Property to plaintiffs "as is" for the previously agreed-upon price so long as they were willing to wait for him to find new housing. Defendant said, however, that he would not cure the apparent defect in title until he found new housing and that he would not be willing to commit to a certain deadline for doing so.[4]

On December 16, 2020, defendant's realtor told plaintiffs' real-estate brokerage that the PA was unenforceable and communicated defendant's new conditions for proceeding with the sale, including that he would not commit to a date certain for it. Plaintiffs responded that they required a date certain; they also communicated that they would continue to proceed toward closing and sought to arrange for an appraisal of the Property.[5] Defendant relayed to his realtor that he would only permit an appraisal "AFTER [plaintiffs have] given release from the currently unenforceable contract." Defendant also told his realtor that "unless a judge tells me that I am forced to sell to [plaintiffs], I will never do so" in the event "they choose to go to war [i.e., file a lawsuit]."

Around this time, defendant instructed his realtor "to go radio silent, stealth mode," and the parties also retained legal counsel who facilitated communications going forward. This led to a phone call between defense counsel and plaintiffs' real-estate attorney. At trial, plaintiffs' real-estate attorney testified that defense counsel was "extremely belligerent" and "very strongly adverse to everything [he] was saying." Based on the tenor of this call—and his understanding that defendant "was resisting closing and was not cooperating with the normal processes such as allowing an appraiser into the house"—the attorney recorded an "Affidavit of Interest" on December 28, 2020, to protect plaintiffs' contractual interest in the Property.[6]

The next day, plaintiff's real-estate attorney sent defense counsel a letter that, among other things, stated that defendant "is a party to a binding purchase agreement" and while defendant

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[4] This was in contrast to the terms of the PA which, as noted, required that closing occur between January 11 and 15, 2021, and that plaintiffs be given immediate occupancy and possession of the Property upon closing.

[5] The PA provided that the "Property must appraise at sales price or higher or purchaser may declare this offer null and void and all earnest money shall be returned to purchaser."

[6] Plaintiffs' real-estate attorney testified that recording such an affidavit is "the standard of care in real estate" when a seller indicates he is balking on a sale, as it signals to the broader public that "somebody has a claim to the property"; he further testified that he did so to "tie up the [P]roperty."

"may wish it were not so," "expressing his seller's remorse by being intransigent and refusing to cooperate with standard transactional activities will not change the effect of signing a purchase agreement." The letter also questioned the notion that defendant could not convey clear title, objected to defendant's "refusal to allow [plaintiffs'] appraiser into the home," and conveyed that plaintiffs "are not going away" and "will buy this house," and "[i]f it occurs following entry of an Order Compelling Specific Performance of the [PA], so be it." Plaintiff's real-estate attorney did not receive a response to this letter.

Ultimately, a drive-by appraisal of the Property's exterior was performed and, on January 12, 2021, plaintiffs' lender cleared plaintiffs to close on the Property. Plaintiffs' closing coordinator notified defendant's realtor of the same and, consistent with the PA, proposed January 15 as the date for closing; the coordinator also asked if plaintiffs could conduct a final walkthrough on January 14 as provided for in Paragraph 18 of the PA. Defendant's realtor then informed defendant and defense counsel of this development. To the closing coordinator's knowledge, he never received a response to the proposed closing date and walkthrough request.

On about January 13, 2021, plaintiffs' real-estate attorney spoke with defense counsel. According to the real-estate attorney, he asked whether any progress had been made in resolving defendant's claimed title-conveyance problem, and defense counsel said that "we asked [defendant's] ex-wife if she would sign, [but] she said no."

No walkthrough occurred on January 14, 2021. Nor did a closing on January 15 take place. At no time did plaintiffs receive closing documents from defendant, and plaintiffs did not prepare their own. According to defendant, the closing did not take place because he believed he could not convey clear title due to his ex-wife. Plaintiffs' real-estate attorney testified that plaintiffs did not prepare closing documents for the January closing because they "had not received any information that [defendant] was ready and willing and able to close" and instead "the last communication was no closing."

B. COMMENCEMENT OF LITIGATION & SETTLEMENT NEGOTIATIONS

On January 25, 2021, plaintiffs filed the instant lawsuit against defendant, alleging breach of contract for defendant's refusal to close on the Property as required by the PA and requesting specific performance of the PA.[7] Plaintiffs also recorded a notice of lis pendens as to the Property.

Shortly afterwards, the parties attempted to settle the dispute. As part of the settlement negotiations, plaintiffs prepared a proposed binding term sheet under which the parties would agree to settle the instant lawsuit "conditional on a closing occurring for the [Property] on or before March 15, 2021." The term sheet, among other things, required defendant to move out of the Property on or before March 30, 2021, and provided that defendant would be a tenant and pay rent "[d]uring the time between closing and move out." The term sheet also made defendant liable for all damages to the Property that accrued during that tenancy, without any cap on such damages. Plaintiffs signed the proposed term sheet on March 11, 2021, and their counsel sent the signed

[7] In the litigation, plaintiffs were represented not by their real-estate attorney, but by separate trial counsel.

version to defense counsel. When doing so, plaintiff's counsel stressed that, under the proposal, defendant's liability for damages as a tenant would not be capped—a point of dispute during negotiations—describing the matter as "not negotiable."

Communications between the parties' counsel then followed. On March 13 and 14, defense counsel notified plaintiffs' counsel that defendant: would attend a closing set for March 15 at 4 PM; was "ready[,] willing[,] and able to sell" the Property to plaintiffs at that closing; and "was prepared to close . . . based on the modified terms and conditions we provided to you." The morning of March 15, plaintiffs' counsel responded, labeling defendant's purported closing a "transparent attempt" to bolster defendant's litigation position by portraying him as ready, willing, and able to convey the Property. Plaintiffs' counsel underscored that the parties had not reached an agreement concerning the damages cap and that the binding term sheet plaintiffs had signed had not been accepted as a result. He also stated that defense counsel had "still not established [defendant's] ability to convey marketable title to the home" and had refused to substantiate his representations about that ability "until [plaintiffs] had agreed to [defendant's] settlement terms"—all of which, in turn, had impeded other necessary matters for any sale, such as financing and an inspection. Thus, plaintiffs' counsel made clear, plaintiffs "will move forward [with] the litigation."

Defense counsel replied at 3:11 PM that afternoon. He conveyed that he and defendant had "done everything to make the deal close so [plaintiffs] would own [the Property] today and bring an end to unnecessary litigation," and defendant remained ready to close that day. Counsel stated that defendant's ex-wife had agreed to execute an addendum and would do so at the closing, and so "[t]here will not be a problem conveying marketable title if [plaintiffs] choose to close." According to defense counsel, defendant's title company confirmed defendant's ability to close and, while he understood that plaintiffs had not done what was needed "to obtain the clear to close" from their end of things, "[t]hat's on your clients, not mine." As to plaintiffs' March 11 proposed binding term sheet, defense counsel recounted that he had responded to plaintiffs' counsel upon its receipt and had communicated his belief that it was contrary to an agreement the parties had previously reached to "cap . . . damages to the [P]roperty ($12,000) unless [defendant] intentionally, willfully, or wantonly damage[d] the [P]roperty during his 15 day occupancy" after closing. Defense counsel concluded that "[w]e hope to see you and your clients at the closing at 4pm today," where "[a]ny minor tweaks to the documents that need to be made, can be done[.]"

Defendant, his ex-wife, his attorney, his real-estate agents, and a title officer then convened that afternoon at a title company. Defendant and his ex-wife executed several documents, including a warranty deed that conveyed the Property to plaintiffs. Plaintiffs did not attend because, according to them, no agreement for such a closing had been reached. At trial, defendant conceded that the parties did not reach an agreed-upon settlement in February or March 2021.[8]

On March 29, 2021, defendant filed an answer and affirmative defenses to the complaint, as well as countersuit against plaintiffs. In his countersuit, defendant alleged two claims for breach

[8] In addition to this concession at the jury trial on liability, defendant confirmed at the subsequent bench trial on damages that he was unaware of any other signed agreements between himself and plaintiffs aside from the PA.

of the PA—one related to plaintiffs' conduct before the January closing date, and the other for refusing to close in March 2021. He also alleged two claims for slander of title, a claim for false encumbrance, and a claim to quiet title that would remove the affidavit of interest and lis pendens.

Extensive discovery and pretrial motion practice followed. In January 2023, plaintiffs filed a motion to bifurcate the trial into a liability phase and a damages phase, which the trial court granted over defendant's opposition. Prior to trial on the liability phase, plaintiffs filed a motion in limine to preclude evidence or testimony regarding the parties' settlement negotiations in February and March 2021 pursuant to MRE 408. Plaintiffs argued that defendant planned to use the settlement evidence to disprove his liability and to prove their liability on his counterclaims—a use expressly barred by MRE 408—and that the exceptions enumerated in that rule were inapplicable. Defendant countered that he sought to introduce the settlement evidence to negate plaintiffs' contention that he unduly delayed closing on the sale of the Property, which was a use permitted under MRE 408's exceptions. After holding a hearing, the trial court denied plaintiffs' motion, agreeing with defendant that the settlement evidence "go[es] to undue delay." Accordingly, the trial court permitted defendant to introduce "emails, [the] binding term sheet, [and] the fact that [plaintiffs] didn't attend what [defendant's] going to contend is the closing to negate plaintiffs' contention that there was undue delay on the sale of the home."

C. LIABILITY TRIAL & POST-TRIAL MOTION PRACTICE

A four-day jury trial then occurred, limited to the issue of liability. Prior to jury selection, plaintiffs renewed their MRE 408 objection, but the trial court abided by the prior ruling on the matter.[9] At trial, the parties presented to the jury their respective theories of breach and liability. Plaintiffs maintained that defendant had made clear early on that he would not abide by the agreed-upon terms of the PA, including its January 2021 closing date; instead, defendant wanted plaintiffs to wait until he found new housing before closing on the Property and sought to use the apparent title defect as a means to extract terms more favorable for him than those set forth in the PA.[10] According to plaintiffs, they did all they could to purchase the Property pursuant to the terms of the PA, but defendant's refusal to perform under the PA foreclosed that from happening and

[9] A different judge presided over the trial proceedings in this case, as to both liability and damages, than had presided over the pretrial proceedings. Both judges were ultimately involved in various aspects of the post-trial proceedings. With respect to the MRE 408 issue, the trial judge opined that, as a visiting judge, it was beyond his purview to revisit or disrupt the pretrial ruling on the matter by the judge assigned to the case.

[10] By the time of trial, it had been learned that sign-off from defendant's ex-wife was not, in fact, necessary to convey clear title to the Property, as had been originally believed. This was by dint of the terms and legal effect of defendant's consent judgment of divorce and its accompanying confidential property settlement agreement, which were produced during discovery. Correspondingly, the jury was instructed at trial that "[a]lthough a divorce settlement agreement may call for each party to quitclaim or transfer their interest to the other party, the consent judgment of divorce provides clear title even if the other spouse fails to sign a quitclaim deed or transfer document." At trial, defendant did not object to this jury instruction or otherwise dispute the legal effect of the divorce judgment on his ability to convey clear title.

amounted to a breach for which he should be held liable. Defendant, meanwhile, maintained that plaintiffs, and not he, should be held liable given that plaintiffs had breached the PA in various ways: by failing to meet the inspection-related deadlines in Paragraph 10 of the PA, which defendant and his realtor took to nullify the PA; by failing to provide documents and otherwise prepare for the PA's designated January 2021 closing; and then by refusing to attend the March 15 closing and consummate the sale of the Property, as defendant was fully ready, willing, and able to do at that time. In response to defendant's claim regarding the March 15 closing, plaintiffs posited that the parties had never reached an agreement for such a sale and the "closing" had simply been staged by defendant to bolster his position in the instant litigation.

Following the close of proofs, the trial court finalized the jury instructions and verdict form. The parties disputed one instruction—plaintiffs' proposed instruction on anticipatory repudiation.[11] Defendant opposed providing the instruction, arguing both that plaintiffs never alleged a "separate cause of action for anticipatory repudiation" and that such an instruction would confuse the jury. Plaintiffs responded that anticipatory repudiation was simply "part of a breach of contract claim" and that, "[in] any case, if the Court prefers, [they] could always conform their pleadings to the issues presented at trial." Siding with defendant, the trial court declined to provide the instruction, concluding that it would be confusing to the jury since "there was no real discussion of anticipatory repudiation" during the trial.

The verdict form presented three questions to the jury, each to be answered "Yes" or "No": (1) "Did DEFENDANT/COUNTER-PLAINTIFF, Robert Blumberg, breach the Purchase Agreement?"; (2) "Did PLAINTIFFS/COUNTER-DEFENDANTS, ROGER LEWIS AND NICOLE SUSSER, breach the Purchase Agreement?"; and (3) "Did PLAINTIFFS/COUNTER-DEFENDANTS, ROGER LEWIS AND NICOLE SUSSER, slander the title of ROBERT BLUMBERG'S HOUSE BY FILING THE AFFIDAVIT OF INTEREST?"[12]

As it deliberated, the jury submitted three questions to the court, including, as relevant here, whether it could "consider the breaching, or lack thereof, of the PA after addendums were made, especially addendums affecting the closing date?" The trial court stated that, for an answer to this

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[11] Plaintiffs' proposed instruction was based on the model jury instruction, M Civ JI 140.15, and provided:

> The Plaintiffs claim that the Defendant breached the contract by repudiating his obligations under the contract before performance was due.
>
> Repudiation occurs when a seller distinctly tells, or through his actions clearly shows, the buyer he does not intend or is unable to perform the contract or any part of the contract, and the loss of performance substantially impairs the value of the contract to the buyer.
>
> You must determine whether the Defendant breached the contract by repudiation.

[12] The verdict form instructed the jury that if it answered "yes" to the first question (regarding defendant's breach), it should skip the second question (regarding plaintiffs' breach) and proceed directly to the third question (regarding slander of title).

question, it would generally refer the jury back to the jury instructions, but the record does not indicate whether answers to the jury's questions were provided to the jury before it returned its verdict. Ultimately, the jury determined that (1) no, defendant did not breach the PA; (2) yes, plaintiffs did breach the PA; and (3) no, plaintiffs did not slander the Property's title by filing the affidavit of interest.

Plaintiffs then moved for judgment notwithstanding the verdict or, in the alternative, a new trial. Plaintiffs argued, among other things, that the trial court erred by allowing settlement evidence to be presented at trial because the evidence was inadmissible under MRE 408(a) and the exceptions articulated in MRE 408(b) were inapplicable. Plaintiffs highlighted the jury's question about considering "addendums affecting the closing date" of the PA, which suggested its verdict was based on the breach of a settlement agreement that both did not exist and should never have been before them in the first place. The trial court stood by its prior ruling regarding the admission of the settlement evidence and denied plaintiffs' motion.

D. DAMAGES TRIAL

In accordance with the bifurcation order, the case then proceeded to a bench trial on damages. After hearing witness testimony and another round of post-trial motion practice, the trial court entered a judgment for damages in defendant's favor. This damages judgment awarded defendant (1) $1,275,000 for the unpaid purchase price of the Property, (2) $255,000 in interest damages, calculated a 5% per annum for four years, (3) plaintiffs' $20,000 earnest money deposit, (4) statutory interest pursuant to MCL 600.6013(8), and (5) taxation of costs pursuant to MCL 600.2455. The judgment, however, awarded plaintiffs a credit of up to $1,275,000 in the event that defendant sold the Property to a new buyer. The trial court also required plaintiffs to remove the affidavit of interest and lis pendens from the Property, which plaintiffs then did. Plaintiffs filed a post-judgment motion to amend the damages judgment, but that motion was denied. Nor were plaintiffs successful in securing a stay on the execution of the judgments against them.

This appeal followed.

II. ANALYSIS

On appeal, plaintiffs raise several challenges to both the liability and damages judgments entered in defendant's favor.[13] As noted, our disposition of this appeal only requires us to reach two of these challenges: that the trial court erred by (1) admitting evidence regarding the parties' settlement efforts at the jury trial on liability, and (2) failing to instruct the jury on the doctrine of anticipatory repudiation. For the reasons discussed below, we agree with these claims of error and conclude that they entitle plaintiffs to relief from the liability and damages judgments against them.[14]

[13] Defendant, for his part, has not filed an appellate brief in response to the instant appeal.

[14] In light of our conclusion that the challenged judgments must be vacated on the basis of these errors, we need not resolve the merits of the other claims of error advanced by plaintiffs on appeal.

A. STANDARDS OF REVIEW

"Evidentiary issues are reviewed for an abuse of discretion." *Danhoff v Fahim*, 513 Mich 427, 441; 15 NW3d 262 (2024). An abuse of discretion occurs when the circuit court's decision falls outside the principled range of outcomes. *Stokes v Swofford*, 514 Mich 423, 441; 22 NW3d 97 (2024). "A trial court necessarily abuses its discretion when it makes an error of law." *Danhoff*, 513 Mich at 442 (quotation marks and citation omitted).

"We review de novo questions of law underlying evidentiary rulings, including the interpretation of statutes and court rules." *Elher v Misra*, 499 Mich 11, 21; 878 NW2d 790 (2016). "[T]he legal principles that govern the construction and application of statutes" also govern our review of the Michigan Rules of Evidence. *Craig v Oakwood Hosp*, 471 Mich 67, 78; 684 NW2d 296 (2004) (cleaned up). Thus, "we apply the plain meaning of the text without further judicial construction or interpretation" when the evidentiary rule's language is unambiguous. *Id.* (cleaned up).

Appellate relief for an evidentiary error is "appropriate only when the error results in substantial prejudice that denies a fair trial to the aggrieved party." *Mitchell v Kalamazoo Anesthesiology, PC*, 321 Mich App 144, 157-158; 908 NW2d 319 (2017), citing MCR 2.613(A). "A trial court's error is harmless if, based on review of the entire record, it is more probable than not that the error was not outcome determinative; if the probability runs in the other direction, then it is reversible error." *Nahshal v Fremont Ins Co*, 324 Mich App 696, 717; 922 NW2d 662 (2018).

"Claims of instructional error are reviewed de novo." *Goodwin v Northwest Mich Fair Ass'n*, 325 Mich App 129, 156; 923 NW2d 894 (2018). Jury instructions "should include all the elements of the plaintiff's claims and should not omit material issues, defenses, or theories if the evidence supports them." *Id.* at 156-157 (quotation marks and citation omitted). An instructional error "do[es] not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury." *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). "Instructional error warrants reversal if the error resulted in such unfair prejudice to the complaining party that the failure to vacate the jury verdict would be inconsistent with substantial justice." *Goodwin*, 325 Mich App at 157 (quotation marks and citation omitted); see also *Case*, 463 Mich at 6, citing MCR 2.613(A).

B. MRE 408

We also note that, while plaintiffs argue that it was defendant who, in fact, breached the PA and that we should award judgment on liability in their favor, plaintiffs have failed to adequately develop the merits of their entitlement to such further relief on appeal, rendering it abandoned for purposes of our instant review. See *Blackwell v City of Inkster*, ___ Mich App ___, ___; ___ NW3d ___ (2026) (Docket No. 372782); slip op at 3 ("Insufficiently briefed issues are deemed abandoned.") (quotation marks and citation omitted).

We start with plaintiffs' claim that the trial court reversibly erred by admitting evidence regarding the parties' settlement efforts, including the March closing arranged by defendant in connection therewith, under the "undue delay" exception of MRE 408. We agree.

As relevant here, MRE 408 provides:

> (a) Prohibited Uses. Evidence of the following is not admissible to either prove or disprove the liability for or the validity or amount of a disputed claim:
>
> * * *
>
> (2) conduct or a statement made during compromise negotiations.
>
> (b) Exceptions. If this evidence is otherwise discoverable, it need not be excluded merely because it is presented during compromise negotiations. And it need not be excluded if admitted for another purpose, such as proving a witness's bias or prejudice, *negating a contention of undue delay*, or proving an effort to obstruct a criminal investigation or prosecution. [(Emphasis added.)]

"The purpose of [MRE 408] is to encourage parties to compromise." *Chouman v Home Owners Ins Co*, 293 Mich App 434, 437; 810 NW2d 88 (2011); see also *Alpha Capital Mgt, Inc v Rentenbach*, 287 Mich App 589, 621; 792 NW2d 344 (2010) ("The rationale of [MRE 408] is that settlement discussions are best encouraged when parties can freely discuss their dispute and offer to compromise their litigation positions without fear that their settlement discussions might be used against them as evidence of the strength or weakness of their cases.") (quotation marks and citation omitted). Accordingly, "MRE 408 prohibits evidence of compromise, offers to compromise, or compromise negotiations in order to prove liability for or invalidity of the claim or its amount." *Chouman*, 293 Mich App at 437 (quotation marks and citation omitted). But the rule also recognizes that "evidence of settlement discussions" may be admissible for other purposes, including—as relevant here—to negate or prove a contention of undue delay. See *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 48; 761 NW2d 151 (2008).

In *Zaremba*, for instance, this Court found that "presuit letters written by plaintiff's counsel that contained information regarding settlement demands and settlement negotiations" were admissible under MRE 408(b)'s "undue delay" exception because the plaintiff used them "to prove that [the] defendants delayed paying claims that were not reasonably in dispute, in violation of MCL 500.2006." *Id*. at 47-48. In other words, the plaintiff's theory of liability for penalty interest under MCL 500.2006 was that the defendants unduly delayed in paying certain claims, and the content of the letters were admissible as proof of that alleged undue delay. Similarly, in *Freidus v First Nat'l Bank of Council Bluffs*, 928 F2d 793, 794 (CA 8, 1991), the plaintiff sued the defendant bank for breach of contract—namely, the defendant's alleged violation of the contractual provision that its "consent [to the sale of certain land] shall not be unreasonably withheld." At trial, the plaintiff introduced testimony that the defendant "never gave any reason for its conditions on consent to the sale, 'even up to this date,' meaning the date of trial." *Id*. at

795. Applying Federal Rule of Evidence 408's analogous "undue delay" exception,[15] the federal appellate court affirmed the trial court's admission of certain letters between the parties' counsel sent during settlement efforts because the letters' content "served to rebut" the testimony that the defendant "had failed to give any reasons for the conditions it had imposed on giving its consent, testimony that left unrebutted would have been devastating to the [defendant's] position that it had not unduly delayed giving its consent." *Id.*

In this case, the parties have not, at any point, disputed that the evidence in question falls within the ambit of MRE 408. Below, defendant argued, and the trial court agreed, that the settlement evidence could nonetheless be admitted at trial under MRE 408(b) to "negat[e] a contention of undue delay"—namely, that defendant unduly delayed closing on the Property because he ultimately agreed to do so in March 2021 rather than January 2021.[16] But plaintiffs never made such a contention. Plaintiffs' theory of liability was that the PA required defendant to sell the Property to them according to certain terms, which included a closing date between January 11 and 15, 2021. According to plaintiffs, in the weeks leading up to that date, defendant made clear he would not perform his obligations under the PA, and so once the time for performance had lapsed, plaintiffs sued for breach and sought specific performance. While this claimed breach did involve a timing component, it was not premised on any contention that defendant had delayed his performance under the PA, unduly or otherwise; it was simply that defendant had disavowed the contract and refused to perform. Cf. *Zaremba*, 280 Mich App at 47-48; *Freidus*, 928 F2d at 795. Nothing about the parties' post-suit settlement efforts altered or had any bearing on plaintiffs' theory of liability, which remained focused exclusively on defendant's conduct up to the January 2021 closing date.

Instead, defendant sought to introduce those post-suit settlement efforts to advance his own theory of liability—that plaintiffs, and not he, should be deemed to have breached the PA because they would not agree to close on the Property in March 2021. This framing fares no better under MRE 408. Plaintiffs did not contend that this proposed March closing was objectionable because it was unduly delayed under the PA, such that defendant would then need to introduce evidence

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[15] See *People v Denson*, 500 Mich 385, 405 n 10; 902 NW2d 306 (2017) ("Because the Michigan Rules of Evidence in general parallel the text of the federal rules on which the state committee's product was based, we find helpful and, in some instances, persuasive, commentary and case law that refers to the Federal Rules of Evidence.") (quotation marks and citation omitted); see also, e.g., *Dep't of Transp v Frankenlust Lutheran Congregation*, 269 Mich App 570, 579-583; 711 NW2d 453 (2006) (looking to federal authority regarding FRE 408 in analyzing admissibility under MRE 408); *Silisky v Midland-Ross Corp*, 97 Mich App 470, 481 n 4; 296 NW2d 576 (1980) (noting that "[t]hough there is an absence of Michigan authority interpreting MRE 408, it is identical to [FRE 408]"); MRE 408, 512 Mich lxiii, cxxi (staff comment) (observing that recent amendments to the Michigan Rules of Evidence were in furtherance of "an effort to remain as consistent as possible with the 2011 restyling of the Federal Rules of Evidence").

[16] Correspondingly, at one point during the presentation of this settlement evidence at trial, the trial judge told the jury, "Settlement negotiations are normally not allowed . . . in these cases but, in this case, because it explains the delay between the January 15th and March 15th, . . . then it's before you[.]"

regarding the settlement efforts to explain or justify the delay. Plaintiffs' position was simply that this closing was not part of the PA, but instead part of failed efforts to settle the lawsuit and negotiate a sale of the Property under new terms; the PA remained the only binding agreement for the sale of the Property, it required that the sale occur under certain terms, and defendant breached those terms. While defendant portrayed his willingness to close in March as a reasonable, or due, delay, that was not in response to or in negation of any claim of undue delay by plaintiffs. And while defendant may have felt—and wanted the jury to agree—that plaintiffs were unreasonable in refusing to accept the proposed closing and so should be held liable for the parties' ongoing dispute, that is precisely the use of settlement negotiations that MRE 408(a) prohibits: to "prove or disprove the liability for . . . a disputed claim." For the reasons discussed, MRE 408(b)'s "undue delay" exception did not provide a path around that prohibition in this case, and the evidence regarding the parties' settlement efforts should not have been admitted.

Based on our review of the entire record, we cannot conclude this error was harmless. See *Nahshal*, 324 Mich App at 717. As discussed, defendant pleaded a counterclaim and advanced a theory of liability based entirely on the improperly admitted evidence of the parties' settlement efforts. Absent such evidence, there would have been no basis for that claim. Instead, the jury was presented with that evidence and claim, and it returned a verdict in defendant's favor, finding plaintiffs liable for breach of contract. And while that verdict did not specify the precise breach that was found, evidence and arguments regarding the parties' settlement efforts, and defendant's theory of liability based upon them, featured prominently at trial. The trial judge also directly addressed the settlement evidence with the jury, at one point informing them that although such evidence was normally not admissible, it was before them in this case "because it explains the delay between the January 15th and March 15th."[17] So too did the matter surface during the jury's deliberations, through their question regarding liability for breaching "addendums affecting the closing date."[18] On the record before us, we find it more probable than not that the erroneous admission of the parties' settlement efforts as evidence was outcome determinative, *id*., and caused

[17] We note also that, at one point when the parties' attorneys were disputing whether or to what extent an agreement had been reached for a March 2021 closing, the trial judge, after excusing the jury, admitted, "I'm really at a loss. Because you've got me confused. I'm sure you've got the jury confused. I don't know what's going on here. . . . [T]his is why we don't allow settlement discussions in, because it's totally screwing up everybody's understanding of this case." The judge continued, "I'm just afraid the jury is going to be so totally confused, like I am, they're not going to know what to do." As noted above, however, the trial judge consistently declined to revisit or disrupt the pretrial ruling on the matter.

[18] As discussed, the trial judge indicated that he would answer this question by generally directing the jury back to the jury instructions, but it is not clear from the record whether the jury received that answer before returning its verdict. In any event, the jury instructions included, among other things, that "the parties do not dispute that there was a contract between them," "[t]he written agreement, along with all attachments thereto, is to be considered in determining the existence or nature of the contractual duties owed by the Parties to each other," and "[i]n determining the parties' intentions under the written contract, you should consider the agreement as a whole, including all of its parts and attachments."

plaintiffs "substantial prejudice that denie[d them] a fair trial," *Mitchell*, 321 Mich App at 157-158.

C. ANTICIPATORY REPUDIATION

We also agree with plaintiffs that the trial court reversibly erred by refusing to instruct the jury on anticipatory repudiation.

According to the doctrine of anticipatory repudiation, "if, before the time of performance, a party to a contract unequivocally declares the intent not to perform, the innocent party has the option to either sue immediately for breach of contract or wait until the time of performance." *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 555; 904 NW2d 192 (2017) (quotation marks and citation omitted). "In determining whether an anticipatory breach has occurred, it is the party's intention manifested by acts and words that is controlling, and not any secret intention that may be held." *Id.* (quotation marks and citation omitted). As has long been recognized, when a seller of land anticipatorily repudiates an agreement for its sale, "[t]hat refusal . . . to perform excuse[s] performance by the [purchaser] and excuse[s] tender of performance by the [purchaser]." *Hanesworth v Hendrickson*, 320 Mich 577, 579; 31 NW2d 726 (1948) (quotation marks omitted). See also, e.g., *id*. at 578-579 ("Under such circumstances, a tender of the purchase price by [the purchaser] would have been an idle ceremony and the fact that [the purchaser] did not make such tender cannot be asserted as a defense."); *Friedman v Winshall*, 343 Mich 647, 653-654; 73 NW2d 248 (1955) ("[T]ender prior to bringing suit for specific performance of a contract is not required if the party against whom the relief is sought has taken the definite position that he will not go through with such contract."); *Buys v Travis*, 243 Mich 470, 474-475; 220 NW 798 (1928) (noting that when there is an anticipatory repudiation by one party, the other "may, if he desires, consider himself as absolved from his duty to perform") (quotation marks and citation omitted).

As discussed, plaintiffs' case was premised on defendant's anticipatory repudiation of the PA, and they presented evidence at trial to that effect—namely, that within a few weeks of signing the PA and consistently through the PA's designated January 2021 closing deadline, defendant made clear to plaintiffs that he viewed the PA to be unenforceable, that he could not convey clear title, and that he would only consider curing the apparent title defect and potentially selling the Property to plaintiffs under terms and a timeline different than those agreed upon in the PA. Such evidence reflected affirmative, unequivocal representations to plaintiffs that defendant would not perform his obligations under the PA, from which plaintiffs could argue that defendant had anticipatorily repudiated the PA and thus that they themselves were, from that point forward, not obligated to perform further under the PA, including by subsequently preparing for and attending a closing on the Property. See *Hanesworth*, 320 Mich at 578-579; *Friedman*, 343 Mich at 653-654; *Buys*, 243 Mich at 474-475; *Van Buren Charter Twp*, 319 Mich App at 555.

In refusing to instruct the jury on anticipatory repudiation, the trial court did not express any concerns about the legal propriety of doing so,[19] but instead opined that it would unduly

[19] Before the trial court, defendant argued that an anticipatory-repudiation instruction was improper because plaintiffs' operative pleadings did not include a separate cause of action for

confuse the jury since there had been "no real discussion" of the doctrine at trial. We fail to see how the instruction should have been stricken on this basis, given the arguments and evidence presented at trial. Regardless of whether the particular phrase "anticipatory repudiation" had been invoked before the jury at the time of the court's decision, plaintiffs, as discussed, had presented ample evidence consistent with and supportive of an instruction on the doctrine. And as noted, the doctrine was directly relevant not only to plaintiffs' theory of defendant's liability, but also to plaintiffs' defense against defendant's opposing theory that plaintiffs breached the PA by not preparing for or attending a closing on the Property in January or March of 2021. Jury instructions "should not omit material issues, defenses, or theories if the evidence supports them." *Goodwin*, 325 Mich App at 157 (quotation marks and citation omitted). Accordingly, the trial court erred by refusing to instruct the jury on the doctrine of anticipatory repudiation.

We further conclude that this error was not harmless. The doctrine of anticipatory repudiation provided plaintiffs both a sword in their claim of defendant's liability for breach of contract and a shield from defendant's counterclaim that they breached the PA by failing to close on the Property. The other instructions to the jury addressed certain breach-of-contract principles but did not capture or account for the potential legal effect and implications of this doctrine on the parties' competing theories of liability. From our review of those instructions and the record, we cannot say that, "on balance, the theories of the parties and the applicable law [were] adequately and fairly presented to the jury." *Case*, 463 Mich at 6. Given the doctrine's materiality to the parties' respective theories of liability, we conclude that it "would be inconsistent with substantial justice" to allow the jury's verdict against plaintiffs to stand despite this instructional error. *Id.*; see also MCR 2.613(A); *Goodwin*, 325 Mich App at 157.

III. CONCLUSION

In sum, the trial court's evidentiary and instructional errors significantly impacted the theories of liability presented to the jury, to the substantial detriment of plaintiffs. Each of these errors, in our view, was enough in itself to warrant relief; taken together, they make that result all the more clear.[20] We therefore vacate the judgment of liability against plaintiffs and, with it, the

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anticipatory repudiation. The trial court did not express agreement with defendant's position in this regard, nor has defendant, below or on appeal, offered any authority in support of it; indeed, as noted, defendant has opted not to file a brief on appeal. See *Maple Grove Twp v Misteguay Creek Intercounty Drain Bd*, 298 Mich App 200, 207 n 2; 828 NW2d 459 (2012). We note further thar our own research has not uncovered support for defendant's position, but instead aligns with plaintiffs' explanation that the doctrine of anticipatory repudiation provides a theory for breach of contract. See, e.g., *Van Buren Charter Twp*, 319 Mich App at 554 (referring to anticipatory repudiation as a theory for breach of contract).

[20] As noted, in addition to arguing that plaintiffs breached the PA by failing to prepare for or attend a closing on the Property in January or March 2021, defendant argued that plaintiffs breached Paragraph 10 of the PA, regarding the Property's inspection. There is nothing in the record, however, to indicate that the jury based its verdict on this theory of breach rather than, or to the exclusion of, the other theories of breach advanced at trial, such that we could conclude that either

judgment for damages, and we remand this matter for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael F. Gadola
/s/ Colleen A. O'Brien
/s/ Philip P. Mariani

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or both of the above-discussed errors were harmless in light of it. We further note that the evidence and arguments offered in support of this theory below were, in our view, quite weak; neither the plain terms of Paragraph 10 nor the evidence presented at trial provided meaningful support for the conclusion that plaintiffs breached that provision, let alone did so in a manner that rendered the PA "null and void" or that entitled defendant to a liability judgment in his favor. Nor has defendant sought to argue as much—or to otherwise defend the determinations below in his favor—on appeal.