STATE OF MICHIGAN

COURT OF APPEALS

GERARD TRUDEL,

Plaintiff-Appellant,

v

CITY OF ALLEN PARK, CITY OF ALLEN PARK EMPLOYEES RETIREMENT SYSTEM, CITY OF ALLEN PARK EMPLOYEES RETIREMENT SYSTEM BOARD OF TRUSTEES, GARY BURTKA, BEVERLY KELLEY, ELLEN TEMPLIN, DAVID TRINGER, and JAMES WILKEWITZ,

Defendants-Appellees.

UNPUBLISHED
November 14, 2013

No. 304507
Wayne Circuit Court
LC No. 10-012758-CZ

GERARD TRUDEL,

Plaintiff-Appellant,

v

CITY OF ALLEN PARK, CITY OF ALLEN PARK EMPLOYEES RETIREMENT SYSTEM, and CITY OF ALLEN PARK EMPLOYEES RETIREMENT SYSTEM BOARD OF TRUSTEES,

Defendants-Appellees.

No. 304567
Wayne Circuit Court
LC No. 10-009157-CZ

GERARD TRUDEL,

Plaintiff-Appellee,

v

CITY OF ALLEN PARK, CITY OF ALLEN PARK EMPLOYEES RETIREMENT SYSTEM,

No. 312351
Wayne Circuit Court
LC No. 10-012758-CZ

CITY OF ALLEN PARK EMPLOYEES RETIREMENT SYSTEM BOARD OF TRUSTEES, GARY BURTKA, BEVERLY KELLEY, ELLEN TEMPLIN, DAVID TRINGER, and JAMES WILKEWITZ,

Defendants-Appellants.

Before: SAWYER, P.J., and O'CONNELL and K. F. KELLY, JJ.

PER CURIAM.

These cases involve three consolidated appeals from two lower court files. In Docket No. 304507, plaintiff appeals by leave granted[1] an order denying plaintiff's motion for orders to show cause, compel discovery, and appoint a master to resolve all discovery issues, and an order denying plaintiff's motion to determine the sufficiency and propriety of admissions, objections, and responses to discovery requests, in a case involving plaintiff's multiple claims related to his pension (the Pension case). In Docket No. 304567, plaintiff appeals as of right an order granting summary disposition to defendants, City of Allen Park Employees Retirement System (Retirement System or Allen Park Retirement System) and City of Allen Park Employees Retirement System Board of Trustees (Board), regarding plaintiff's Freedom of Information Act (FOIA), MCL 15.231 *et seq*., claim (the FOIA case). In Docket No. 312351, defendants, the city of Allen Park (the City), the Retirement System, the Board, Gary Burtka, Beverly Kelley, Ellen Templin, David Tringer, and James Wilkewitz, appeal as of right an order granting plaintiff's motion for summary disposition, and an order denying defendants' motion for summary disposition, in the Pension case. We affirm in Docket Nos. 304507 and 304567 and affirm in part, reverse in part, and remand for further proceedings in Docket No. 312351.

I. DOCKET NO. 304507

Plaintiff argues that the trial court abused its discretion in limiting him to 50 discovery requests and in declining to determine the sufficiency and propriety of defendants' objections, admissions, and responses to discovery requests. We disagree. "Generally, we review the grant or denial of a discovery motion for an abuse of discretion. An abuse of discretion is not simply a matter of a difference in judicial opinion, rather it occurs only when the trial court's decision is

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[1] This Court granted plaintiff's application for leave to appeal in Docket No. 304507, and consolidated that appeal with plaintiff's appeal by right in Docket No. 304567. *Trudel v City of Allen Park*, unpublished order of the Court of Appeals, entered November 3, 2011 (Docket No. 304507). Later, this Court consolidated the appeal in Docket No. 312351 with the appeals in Docket Nos. 304507 and 304567. *Trudel v City of Allen Park*, unpublished order of the Court of Appeals, entered March 20, 2013 (Docket Nos. 304507, 304567, 312351).

outside the range of reasonable and principled outcomes." *Augustine v Allstate Ins Co*, 292 Mich App 408, 419; 807 NW2d 77 (2011) (citation omitted).

> Michigan has long espoused a liberal discovery policy that permits the discovery of any matter, not privileged, that is relevant to the subject matter involved in the pending case. MCR 2.302(B)(1); *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 616; 576 NW2d 709 (1998). The purpose of discovery is to simplify and clarify the contested issues, which is necessarily accomplished by the open discovery of all relevant facts and circumstances related to the controversy. See *id*., citing *Domako v Rowe*, 438 Mich 347, 360; 475 NW2d 30 (1991). However, the court rules also ensure that discovery requests are fair and legitimate by providing that discovery may be circumscribed to prevent excessive, abusive, irrelevant, or unduly burdensome requests. MCR 2.302(C); *Cabrera v Ekema*, 265 Mich App 402, 407; 695 NW2d 78 (2005); *In re Hammond Estate*, 215 Mich App 379, 386; 547 NW2d 36 (1996). [*Hamed v Wayne Co*, 271 Mich App 106, 109-110; 719 NW2d 612 (2006).]

Among the options available to the trial court to protect a party from annoyance, oppression, or undue burden or expense, the court may order "that the discovery not be had[,]" MCR 2.302(C)(1), "that the discovery may be had only on specified terms and conditions, including a designation of the time or place[,]" MCR 2.302(C)(2), or "that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery[,]" MCR 2.302(C)(3). See *Cabrera*, 265 Mich App at 407. Also, a party may not use discovery to engage in a fishing expedition. *Augustine*, 292 Mich App at 419.

Here, the trial court's decision to limit plaintiff to a total of 50 discovery requests fell within the range of principled outcomes. Plaintiff submitted more than 350 discovery requests during the Pension lawsuit, in addition to the 200 FOIA requests that were made before the Pension case was filed. Defendants argued that these discovery requests were burdensome and unnecessary. Defendants also asserted that the discovery requests were repetitive, redundant, and sometimes irrelevant. Defendants note that many of the discovery requests pertained to defendants' failure to admit legal assertions contained in the complaint, rather than factual matters. Although the trial court did not explicitly state at the motion hearing its reason for limiting plaintiff to 50 discovery requests, the court imposed this limitation shortly after defense counsel objected to answering more than 350 discovery requests and asserted that plaintiff was abusing process and wasting the court's time. The record thus supports an inference that the excessive number of discovery requests submitted by plaintiff formed the basis for the trial court's decision.[2] Plaintiff has failed to articulate why he could not obtain the necessary

[2] Although the court's decision to limit plaintiff to 50 discovery requests was initially made in the context of a similar discovery dispute in the FOIA case, the court later explained that this limitation also applied to the Pension case, and that plaintiff could submit a total of 50 requests for both cases. It is thus reasonable to conclude that the trial court's rationale for imposing this discovery limitation applied to both cases.

discovery information through 50 requests. Given the excessive discovery requests, the court's decision to impose a limitation of 50 requests was not an abuse of discretion.

Further, the trial court properly denied plaintiff's subsequent motion to determine the sufficiency and propriety of defendants' admissions, objections, and responses to discovery requests. In this motion, plaintiff contended that defendants had provided 603 improper or insufficient objections or responses to discovery requests. In response, defendants noted that the trial court had limited plaintiff's discovery requests to 50 and asserted that plaintiff's overly burdensome and unreasonable discovery requests had increased the costs of litigation and caused unnecessary delay. At the hearing on this motion, defense counsel again noted that the trial court had limited plaintiff to 50 discovery requests and that plaintiff was complaining about 603 responses. In fact, plaintiff had not yet served on defendants the 50 discovery requests to which the trial court had limited plaintiff. The court thus denied plaintiff's motion without prejudice and indicated that the motion could be brought after defendants had answered the 50 discovery requests, given that the court had reconfigured the case to 50 requests. The court explained that it had set aside the previous discovery that had occurred in this case when the court reconfigured the case to 50 discovery requests.

We conclude that the trial court's decision fell within the range of principled outcomes. The sufficiency of defendants' responses to earlier discovery requests was irrelevant given that the trial court had reconfigured discovery by limiting plaintiff to 50 requests. Because plaintiff had not yet served those 50 requests on defendants when plaintiff's motion to determine the sufficiency and propriety of defendants' responses was heard, the trial court properly denied the motion without prejudice.[3]

II. DOCKET NO. 304567

Plaintiff argues that the trial court erred in granting summary disposition to defendants regarding plaintiff's FOIA claim. We disagree. "This Court reviews de novo a trial court's decision on a motion for summary disposition." *Hackel v Macomb Co Comm*, 298 Mich App 311, 315; 826 NW2d 753 (2012). With respect to a motion under MCR 2.116(C)(8), a court considers the pleadings alone to test the legal sufficiency of a claim. *Capitol Props Group, LLC v 1247 Center Street, LLC*, 283 Mich App 422, 425; 770 NW2d 105 (2009). "[A]ll factual allegations in support of the claim are accepted as true and viewed in the light most favorable to the nonmoving party. The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id*. (citations omitted).

"In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists

[3] The record does not indicate whether or when plaintiff ever served the 50 discovery requests permitted by the trial court; there is no indication that further discovery motions were filed or heard after this interlocutory appeal in Docket No. 304507 ensued.

to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

"This Court . . . reviews de novo a trial court's legal determination in a FOIA case." *Hopkins v Duncan Twp*, 294 Mich App 401, 408; 812 NW2d 27 (2011). "[T]he clear error standard of review applies in FOIA cases where a party challenges the underlying facts that support the trial court's decision. In that case, the appellate court must defer to the trial court's view of the facts unless the appellate court is left with the definite and firm conviction that a mistake has been made by the trial court." *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 472; 719 NW2d 19 (2006). Any discretionary determinations in FOIA cases are reviewed for an abuse of discretion. *Id*.

MCL 15.231(2) provides:

> It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act [i.e., the FOIA]. The people shall be informed so that they may fully participate in the democratic process.

"The FOIA provides that 'a person' has a right to inspect, copy, or receive public records upon providing a written request to the FOIA coordinator of the public body." *Detroit Free Press, Inc v Southfield*, 269 Mich App 275, 290; 713 NW2d 28 (2005). "Under FOIA, a public body must disclose all public records that are not specifically exempt under the act." *Hopkins*, 294 Mich App at 409, citing MCL 15.233(1) and *Coblentz v Novi*, 475 Mich 558, 571, 573; 719 NW2d 73 (2006).

"When the disclosure that a [FOIA] suit seeks has already been made, the substance of the controversy disappears and becomes moot." *Herald Co, Inc v Ann Arbor Pub Sch*, 224 Mich App 266, 270-271; 568 NW2d 411 (1997). See also *Densmore v Dep't of Corrections*, 203 Mich App 363, 366; 512 NW2d 72 (1994) ("Once the records are produced the substance of the controversy disappears and becomes moot since the disclosure which the suit seeks has already been made.") (internal quotation marks and citation omitted); *Traverse City Record Eagle v Traverse City Area Pub Sch*, 184 Mich App 609, 610; 459 NW2d 28 (1990) (noting that the plaintiff, who sought access to a tentative collective bargaining agreement, "was given a copy of the agreement at issue after it was ratified by the contracting parties, rendering the issue in this case moot.").

"This Court's duty is to consider and decide actual cases and controversies." *Morales v Parole Bd*, 260 Mich App 29, 32; 676 NW2d 221 (2003). This Court generally does not address moot questions or declare legal principles that have no practical effect in a case. *Id*. "An issue is moot if an event has occurred that renders it impossible for the court to grant relief. An issue is

also moot when a judgment, if entered, cannot for any reason have a practical legal effect on the existing controversy." *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 386; 803 NW2d 698 (2010) (citation omitted).

Here, the substance of the controversy regarding plaintiff's FOIA claim is moot because defendants have provided the requested documents. On Friday, May 20, 2011, three days before the hearing on the motion for summary disposition, the Retirement System and the Board submitted a notarized affidavit of Michael I. Mizzi, dated May 20, 2011, stating:

> 1. I am an adult, and am competent to testify to the matters stated in this Affidavit based upon my personal knowledge.
>
> 2. I am the City Clerk of the City of Allen Park, and have been at all relevant times.
>
> 3. As City Clerk, I am also the Secretary of the City of Allen Park Employees Retirement System, and have been at all relevant times.
>
> 4. The City of Allen Park Employees Retirement System has received ten requests pursuant to the Michigan Freedom of Information Act from Gerald Trudel.
>
> 5. I, on behalf of the Retirement System, have compiled responses to all of Mr. Trudel's requests.
>
> 6. I am informed that on September 4, 2010, Mr. Trudel received the Retirement System's compiled responses.
>
> 7. The Retirement System is not withholding any records relevant to any of Mr. Trudel's requests.
>
> 8. I have reviewed the facts stated in Defendants' Motion for Summary Disposition and Brief in Support, and know the facts to be true and am competent to testify if called.

At the motion hearing on May 23, 2011, plaintiff asserted that he had presented an affidavit disputing the contentions in Mizzi's affidavit and listing the documents defendants had purportedly failed to provide. However, no such affidavit is in the lower court file, nor does the register of actions indicate that such an affidavit was filed. A copy of an unsigned affidavit supposedly by plaintiff, describing in general terms various requested documents that plaintiff claims not to have received, is appended to plaintiff's brief on appeal in Docket No. 304567. According to defendants, the reason any such requested documents were not provided is that they do not exist.

Plaintiff argues that Mizzi's affidavit should not have been considered because it was not filed in a timely fashion. Plaintiff notes that MCR 2.116(G)(1)(a) provides:

> (a) Unless a different period is set by the court,

(*i*) a written motion under this rule with supporting brief and any affidavits must be filed and served at least 21 days before the time set for the hearing. . . .

It is true that Mizzi's affidavit was not filed and served on plaintiff until Friday, May 20, 2011, which was one business day before the May 23, 2011, motion hearing. However, a trial court has discretion to consider a late affidavit as evidence. See *Prussing v Gen Motors Corp*, 403 Mich 366, 370; 269 NW2d 181 (1978). Mizzi's affidavit contained relevant information and assisted in resolving the motion for summary disposition; the affidavit indicated that the requested documents had been provided to plaintiff, which was relevant in determining whether the controversy was moot. There is no basis to conclude that the affidavit was unfairly prejudicial. Plaintiff did not request an adjournment of the motion hearing to develop or present additional evidence. The motion hearing transcript reflects that plaintiff had an opportunity to prepare his own affidavit, but that affidavit is not part of the lower court record, and plaintiff's purported affidavit appended to his brief on appeal is unsigned. We conclude that the trial court did not abuse its discretion in considering Mizzi's late affidavit as evidence.

Accordingly, Mizzi's affidavit established that defendants provided all of the requested documents that existed, and there was no evidence in the record to dispute this affidavit. Because no genuine issue of material fact existed regarding whether defendants provided the requested documents, the substance of the controversy regarding the FOIA claim was moot, and summary disposition for defendants was proper under MCR 2.116(C)(10).[4]

III. DOCKET NO. 312351

In the Pension case, defendants argue that the trial court erred in granting summary disposition to plaintiff and in denying defendants' motion for summary disposition. We agree that the trial court erred in granting summary disposition to plaintiff. Further, we conclude that the trial court partially erred in denying defendants' motion for summary disposition; the entity defendants (the City, the Retirement System, and the Board) are entitled to governmental immunity with respect to plaintiff's tort claims, but in all other respects defendants have failed to establish entitlement to summary disposition.

To provide background for our analysis of this issue, we note that plaintiff was a 24th district court judge from January 1, 1993, until his resignation on February 27, 2003. Plaintiff claims that he suffers a total and permanent disability arising from major depression and anxiety

[4] It is also notable that, during an earlier hearing in the FOIA case, plaintiff stated that it was not necessary to order defendants to produce the requested documents because "nearly everything [plaintiff] requested" had been provided. A party cannot stipulate to a matter and then argue on appeal that the resulting action was erroneous. *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 532; 695 NW2d 508 (2004) quoting *Chapdelaine v Sochocki*, 247 Mich App 167, 177; 635 N.W.2d 339 (2001). "A party who waives a right is precluded from seeking appellate review based on a denial of that right because waiver eliminates any error." *The Cadle Co v City of Kentwood*, 285 Mich App 240, 255; 776 NW2d 145 (2009).

disorders, and that these disorders resulted from the performance of his judicial duties. Plaintiff was a member of both the State of Michigan Judges Retirement System (the state retirement system) and the Allen Park Retirement System. He seeks to recover a duty disability pension from the Allen Park Retirement System, in addition to the disability pension he receives from the state retirement system. A medical advisor for the state retirement system determined that plaintiff was totally and permanently disabled; however, the state retirement system does not differentiate between duty and non-duty disability, whereas the Allen Park Retirement System does. In addition to his disability pension from the state retirement system, plaintiff has been receiving a service retirement pension from the Allen Park Retirement System since he applied for it in 2008; plaintiff contends, however, that he is entitled to a *duty disability* pension.

"The applicability of governmental immunity is a question of law that is reviewed de novo on appeal." *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004). This Court also "review[s] de novo as a question of law whether a claim is barred by a statute of limitations." *Miller-Davis Co v Ahrens Constr, Inc (On Remand)*, 296 Mich App 56, 59; 817 NW2d 609 (2012), lv gtd 494 Mich 861 (2013).

"Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by immunity granted by law." *State Farm Fire & Cas Co v Corby Energy Servs, Inc*, 271 Mich App 480, 482; 722 NW2d 906 (2006). Summary disposition under MCR 2.116(C)(7) may also be granted when a statute of limitation bars a claim. *Prins v Mich State Police*, 291 Mich App 586, 589; 805 NW2d 619 (2011). "In determining whether summary disposition under MCR 2.116(C)(7) is appropriate, a court considers all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." *Blue Harvest, Inc v Dep't of Transp*, 288 Mich App 267, 271; 792 NW2d 798 (2010).

"A motion brought under MCR 2.116(C)(9) seeks a determination whether the opposing party has failed to state a valid defense to the claim asserted against it." *In re Smith Estate*, 226 Mich App 285, 288; 574 NW2d 388 (1997). A motion under MCR 2.116(C)(9) "is analogous to one brought pursuant to MCR 2.116(C)(8) in that both motions are tested by the pleadings alone, with the court accepting all well-pleaded allegations as true. The test is whether the defendant's defenses are so clearly untenable as a matter of law that no factual development could possibly deny a plaintiff's right to recovery." *Id*. (citations omitted).

As with statutory interpretation, the interpretation of ordinances is reviewed de novo. *Soupal v Shady View, Inc*, 469 Mich 458, 462; 672 NW2d 171 (2003). In interpreting a statute or ordinance, this Court gives effect to the intent of the enactors by examining the plain language used in the enactment. *Ferguson v City of Lincoln Park*, 264 Mich App 93, 95; 694 NW2d 61 (2004). Courts must apply the language as written if it is clear and unambiguous. *Id*. at 95-96.

> This Court reviews a lower court's review of an agency decision to determine whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings. This standard of review is the same as a "clearly erroneous" standard of review. A finding is clearly erroneous when, on review of the whole record, this Court is left with the definite and firm conviction that a

mistake has been made. [*Dignan v Mich Pub Sch Employees Retirement Bd*, 253 Mich App 571, 575-576; 659 NW2d 629 (2002) (internal quotation marks and citations omitted).]

A circuit court's review of an administrative agency's decision is limited to determining whether the decision was contrary to law, was supported by competent, material, and substantial evidence on the whole record, was arbitrary or capricious, was clearly an abuse of discretion, or was otherwise affected by a substantial and material error of law. "Substantial" means evidence that a reasoning mind would accept as sufficient to support a conclusion. Courts should accord due deference to administrative expertise and not invade administrative fact finding by displacing an agency's choice between two reasonably differing views. [*Id*. at 576 (citations omitted).]

Initially, we hold that the trial court erred in granting summary disposition to plaintiff. It is notable that plaintiff moved only for *partial* summary disposition regarding his breach of contract and breach of installment contract claims, pursuant to MCR 2.116(C)(9) and (C)(10), arguing that the Allen Park ordinances did not require him to file a written application or written request for duty disability benefits. Plaintiff also noted that defendants received notices from the State Court Administrative Office in March 2003 that plaintiff was disabled. Plaintiff failed to present an argument for granting summary disposition with respect to his remaining claims. Yet the trial court granted summary disposition to plaintiff and closed the case, without explaining whether or on what ground it was granting summary disposition regarding all of the 19 counts asserted in plaintiff's complaint. The trial court stated the following reasons for granting summary disposition to plaintiff:

THE COURT: Well, the ruling of the Court is number one, Social Security Administration disabled Mr. Trudel.

Number two, *the State of Michigan gave him a disability pension, so he qualified for a duty disability pension under the City of Allen Park Retirement System*.

The Court is going to grant the Plaintiff's motion. He – as far as the issue of application, he did apply in writing in a letter to the Allen Park Retirement System, so there's no problem there, he has requested, so, the Court will grant Plaintiff's motion and deny Defendant's.

You can submit an order to that effect, that closes the case. [Emphasis added.]

The trial court's reasoning was flawed. The fact that plaintiff was granted a disability pension by the state retirement system fails to establish that he was entitled to a duty disability retirement from the Allen Park Retirement System. A medical advisor for the state retirement system determined that plaintiff was totally and permanently disabled; however, the state retirement system does not differentiate between duty and non-duty disability, whereas the Allen

Park Retirement System does. Cf. MCL 38.2507; Allen Park Ordinances, § 2-185(a). In particular, Allen Park Ordinances, § 2-185(a), provides:

> (a) *Retirement*. If an employee shall become totally incapacitated for duty by reason of injury, illness or disease *resulting from performance of duty*, and if the board of trustees by or on behalf of such member or by the head of his department so certifies, such member shall be retired; provided, the medical director, after examination of such member, shall certify to the board of trustees his total incapacity. [Emphasis added.]

Thus, although the state retirement system has found that plaintiff is disabled, he is not entitled to a duty disability pension under the Allen Park Retirement System unless his injury, illness, or disease *resulted from* the performance of duty. Findings by other entities that plaintiff was *disabled* fails to establish that his injury, illness, or disease *resulted from* the performance of his judicial duties. Plaintiff has identified no evidence demonstrating that his disability resulted from the performance of his duties;[5] thus, the existing record does not establish as a matter of law that defendants were obligated to pay duty disability benefits to plaintiff. The trial court therefore erred in determining that plaintiff was entitled to summary disposition on this ground.

Although the grant of summary disposition to plaintiff was erroneous, the question remains whether defendants are entitled to summary disposition. We conclude that the entity defendants are entitled to governmental immunity with respect to plaintiff's tort claims, but that in all other respects defendants have failed to establish entitlement to summary disposition.

Defendants first contend that the Board's determination that plaintiff was entitled to a deferred service retirement pension rather than a duty disability pension must be upheld because the determination is supported by substantial and competent evidence and is not arbitrary or capricious or an abuse of discretion. That is, defendants assert there is no basis to upset the Board's administrative determination regarding plaintiff's pension. This argument is flawed in two respects. First, defendants fail to identify a particular administrative determination by the Board and an administrative record in which that determination can be reviewed. No record has been provided establishing precisely when or how the Board determined that plaintiff was entitled to a deferred service retirement pension rather than a duty disability pension. Second, plaintiff does not merely seek judicial review of an administrative decision of the Board. Rather, plaintiff asserts a variety of legal claims, including contract, tort, civil rights, and other causes of action. Presumably, defendants intend to suggest that plaintiff's legal claims must fail because the administrative determinations by the Board to which courts must defer prevent plaintiff from establishing the elements of his claims. But defendants fail to analyze each of plaintiff's 19 claims to explain how the elements of each claim cannot be established in light of the deference owed to the Board's administrative determinations.

[5] We question whether the disability arose from performance of his judicial duties as opposed to the stress related to the disciplinary action taken against plaintiff.

An appellant cannot "simply announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. Failure to brief a question on appeal is tantamount to abandoning it." *State Treasurer v Sprague*, 284 Mich App 235, 243; 772 NW2d 452 (2009) (citation and internal quotation marks omitted). After discussing the limited scope of judicial review of administrative decisions, defendants merely assert that "[b]ased on the foregoing, [p]laintiff has provided no legal basis for his claims and was not entitled to the relief requested." Defendants fail to offer a specific argument regarding precisely how the limited scope of review prevents plaintiff from establishing the elements of the claims in each of the 19 counts in plaintiff's complaint. Therefore, defendants have failed to establish that they are entitled to summary disposition on this basis, and this aspect of defendants' argument is deemed abandoned as insufficiently briefed.

Next, defendants assert that plaintiff failed to exhaust his administrative remedies before filing this action. "The doctrine of exhaustion of administrative remedies requires that where an administrative agency provides a remedy, a party must seek such relief before petitioning the court. The converse, however, is that where the administrative appellate body cannot provide the relief sought, the doctrine does not apply." *Cummins v Robinson Twp*, 283 Mich App 677, 691; 770 NW2d 421 (2009) (citations omitted). Here, defendants have failed to identify a particular administrative remedy or appeal process by which plaintiff could have contested the denial of duty disability benefits. Indeed, defendants admitted below that they "have not established or required an administrative appeal or process regarding duty disability retirement from the Retirement System." Although defendants assert that the Board's meetings are open to the public and that time is allowed for the public to address the Board, defendants fail to cite authority establishing that a mere opportunity to speak at a public meeting constitutes the type of administrative remedy or appeal process that must be exhausted before petitioning a court. Defendants' appellate argument on this point is insufficiently developed to permit review. *Sprague*, 284 Mich App at 243.

Next, defendants argue that plaintiff has not established entitlement to a writ of superintending control. Defendants state that plaintiff never applied to the Board for disability benefits and never applied for worker's compensation benefits, which is a requirement for a duty disability pension. Although plaintiff resigned his judicial office in February 2003, he did not inquire about his retirement benefits until July 2008. Defendants assert that the Board properly classified plaintiff as a deferred vested member, did not abuse its discretion, and did not act in an arbitrary and capricious manner. Therefore, defendants argue, plaintiff's claim for a writ of superintending control should have been dismissed.

"For superintending control to lie, the plaintiff must establish that the defendant has failed to perform a clear legal duty and that [the] plaintiff is otherwise without an adequate legal remedy." *In re Credit Acceptance Corp*, 273 Mich App 594, 598; 733 NW2d 65 (2007), aff'd 481 Mich 883 (2008). Here, defendants' argument fails to address the various grounds asserted by plaintiff for seeking superintending control. In particular, count 19 of plaintiff's complaint alleged multiple reasons why he claimed superintending control was warranted, including:

(1) Plaintiff was denied due process when (a) the Board's attorney asked that plaintiff's purported pension request be placed on the Board's agenda in July 2003 even though plaintiff

had not yet submitted a pension request to defendants, (b) the supposed pension request was never presented to the Board at the July 10, 2003, Board meeting, (c) nonetheless, at the meeting in question, the Board adopted a resolution directing its attorney to send plaintiff a letter explaining that he must file a retirement application and choose a pension option within 30 days or the default pension provisions would take effect, (d) no notice was given to plaintiff before the proceedings on his purported pension request, (e) plaintiff never received a letter from the Board's attorney as directed by the Board and defendants have admitted no such letter exists, (f) no notice was given to plaintiff demanding that he submit a written application, and (g) defendants provided no notice to plaintiff before the Board considered and determined plaintiff's retirement benefits on various dates in 2008 and 2010;

(2) Defendants' demand that plaintiff submit a written application for duty disability benefits was contrary to law, unsupported by competent, material, and substantial evidence, arbitrary and capricious, and an abuse of discretion, because (a) defendants were notified in March 2003 that the state retirement system's medical advisor had determined that plaintiff was totally and permanently disabled, (b) the duty disability provision in the Allen Park ordinances does not require the submission of a written application for duty disability retirement benefits, (c) notice to the Board by a third party on behalf of the duty disabled member is sufficient, and (d) two other members of the Retirement System were granted a duty disability pension but were not required to submit an application;

(3) Defendants' refusal to request or order the Board's medical director to certify plaintiff's total incapacity was an abuse of discretion, given that (a) defendants knew that the state retirement system's medical advisor had certified plaintiff's total incapacity, (b) defendants knew that plaintiff was receiving disability benefits from the state retirement system, (c) the relevant Allen Park ordinance requires the medical director to certify a member's total incapacity, and (d) the ordinance required the Board to order the medical director to examine plaintiff and certify his incapacity; and

(4) Defendants' determination of the date of plaintiff's retirement as July 10, 2008, was arbitrary and capricious, given that (a) defendants knew that plaintiff had been certified as disabled and was receiving disability benefits through the state retirement system, (b) defendants no longer paid a salary to plaintiff after February 27, 2003, (c) plaintiff no longer contributed money to the Allen Park Retirement System after February 27, 2003, (d) plaintiff resigned and retired effective in February 2003 as a result of his certified disability, (e) in his 2008 application for duty disability benefits, plaintiff listed July 10, 2008, as his retirement date at the suggestion of City Clerk Mizzi, and (f) the determination of July 10, 2008, as the date when plaintiff retired was not supported by competent, material, and substantial evidence.

As the above summary reflects, plaintiff asserted multiple factual bases for his request for a writ of superintending control. Defendants' argument on appeal fails to address the various grounds to explain why a writ of superintending control should be denied on the bases asserted. Instead, defendants merely assert in conclusory fashion that the Board never received an application for disability benefits from plaintiff and that plaintiff resigned in February 2003 but did not inquire about his benefits until July 2008. The Board claims it did not abuse its discretion in treating plaintiff as a deferred vested member. Because defendants fail to present an argument addressing the grounds asserted for seeking superintending control in the complaint,

defendants' argument that they are entitled to summary disposition with respect to this claim must be deemed abandoned as insufficiently briefed. *Sprague*, 284 Mich App at 243.

Next, defendants assert that plaintiff failed to plead and cannot prove an impairment or diminishment of a contractual obligation to an accrued financial benefit. Const 1963, art 9, § 24 provides, in pertinent part: "The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby." "Article 9, § 24 protects those persons covered by a state or local pension or retirement plan from having their benefits reduced." *Seitz v Probate Judges Retirement Sys*, 189 Mich App 445, 449; 474 NW2d 125 (1991).

Initially, defendants' argument on this point is deficient because it fails to address the actual claim as framed in plaintiff's complaint. Count 12 of plaintiff's complaint alleged that his retirement benefits were diminished in violation of Const 1963, art 9, § 24 and an analogous provision in the Allen Park Charter because defendants assessed plaintiff $850 for actuarial fees necessitated by a domestic relations order. Defendants fail to address whether this assessment violated the constitutional provision; instead, defendants argue more generally that plaintiff's benefits were not diminished or impaired because plaintiff had not reached the appropriate age to begin receiving benefits when he resigned, and once he reached the appropriate age and applied for a benefit, he began receiving benefits in July 2008 under the deferred pension provisions in the Allen Park Code. Because defendants' argument fails to address the actual nature of plaintiff's claim regarding Const 1963, art 9, § 24, i.e., the actuarial fees necessitated by a domestic relations order, defendants' argument on this point is deemed abandoned as insufficiently briefed. *Sprague*, 284 Mich App at 243.

However, even reviewing this argument as framed by defendants, i.e., without reference to the actuarial fee related to the domestic relations order, we conclude that a disputed issue of fact exists regarding whether plaintiff's accrued financial benefits were diminished or impaired. The resolution of this question as argued by defendants seems to hinge on whether plaintiff was entitled to duty disability benefits, thereby rendering the non-disability retirement benefits he has been paid to be effectively a reduction of the benefits to which he is entitled. On the one hand, as discussed above, the Allen Park ordinance entitles plaintiff to a duty disability benefit only if his disability *resulted from* the performance of duty, Allen Park Ordinances, § 2-185(a), and the record contains no evidence that plaintiff's disability resulted from the performance of his duties. Further, an affidavit from City Clerk Mizzi indicates that the Board did not receive an application for retirement benefits from plaintiff until July 2008, that when plaintiff resigned the Retirement System determined that he did not yet qualify for a service retirement benefit, that the Board determined plaintiff to be a deferred vested member, and that the Retirement System is now paying plaintiff $352.20 a month consistent with his July 2008 application for retirement benefits. These facts suggest that plaintiff is being paid the retirement benefits to which he is entitled.

On the other hand, plaintiff observes that the Allen Park ordinance does not expressly require that he personally apply for a duty disability benefit, that defendants received notice when plaintiff resigned in 2003 that the state retirement system's medical advisor had found that plaintiff was disabled, and that defendants took no action directing the Board's medical advisor to certify plaintiff's incapacity, in accordance with Allen Park Ordinances, § 2-185(a). These

facts support a conclusion that the absence of evidence regarding the cause of plaintiff's disability is partially attributable to defendants for failing to pursue the matter after receiving notice of plaintiff's disability from the state retirement system. Further, defendants admitted below that plaintiff did not request the deferral of his retirement benefits and that he did not receive notice before his benefits were deferred. On balance, we find that a genuine issue of material fact exists regarding whether plaintiff was entitled to duty disability benefits, thus making summary disposition inappropriate on whether his benefits were improperly diminished.

Next, defendants assert that plaintiff's state constitutional claims are barred under *Jones v Powell*, 462 Mich 329; 612 NW2d 423 (2000). In *Jones*, the plaintiff sued police officers for damages arising out of the officers' forced entry into her home when the officers were searching for a suspect. *Id*. at 330. Our Supreme Court declined to infer a damages remedy for a violation of the Michigan Constitution because other remedies were available at common law and under 42 USC 1983. *Id*. at 335-337. Here, defendants fail to explain adequately why *Jones* requires dismissal of any of plaintiff's claims. Defendants fail even to identify precisely which of plaintiff's 19 claims they think must be dismissed under *Jones*. Defendants assert merely that plaintiff "has other remedies available to attempt to redress the claimed wrongs related to the state constitutional claims as asserted[,]" but defendants fail to identify to which of plaintiff's claims they are referring and precisely what other remedies they think are available to redress those claims. Given this lack of elaboration, this argument is deemed abandoned. *Sprague*, 284 Mich App at 243. It is impossible to analyze in a coherent fashion defendants' vague assertion that some unspecified claims are barred because some other unspecified remedies are available.

Next, defendants assert that the individual defendants, i.e., current or former Board members, are entitled to governmental immunity with respect to any tort claims asserted by plaintiff because, according to defendants, plaintiff has failed to plead any facts establishing that the individual defendants were grossly negligent and that their gross negligence was the proximate cause of plaintiff's damages. This argument is deemed abandoned as insufficiently briefed. Where the plaintiff's claim is against an individual governmental employee rather than a governmental entity, the burden is on the defendant to raise and prove governmental immunity as an affirmative defense. *Odom v Wayne Co*, 482 Mich 459, 479; 760 NW2d 217 (2008); *Latits v Phillips*, 298 Mich App 109, 114; 826 NW2d 190 (2012). In determining whether governmental immunity applies to lower level governmental employees, it must first be determined whether the plaintiff has pleaded a negligent tort or an intentional tort. *Odom*, 482 Mich at 479-480. With respect to *negligent* torts, MCL 691.1407(2) provides:

> Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:
>
> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.

(b) The governmental agency is engaged in the exercise or discharge of a governmental function.

(c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

However, if the plaintiff has pleaded an *intentional* tort against a lower level governmental employee, then the defendant must show the following to establish entitlement to immunity:

(a) The acts were undertaken during the course of employment and the employee was acting, or reasonably believed that he was acting, within the scope of his authority,

(b) the acts were undertaken in good faith, or were not undertaken with malice, and

(c) the acts were discretionary, as opposed to ministerial. [*Odom*, 482 Mich at 480.]

Here, defendants' argument is insufficiently briefed to permit appellate review, for multiple reasons. First, defendants fail to recognize that governmental employees have the burden to raise and prove governmental immunity as an affirmative defense. *Odom*, 482 Mich at 479; *Latits*, 298 Mich App at 114. Instead, defendants premise their argument on the incorrect assumption that *plaintiff* had the burden to plead facts in avoidance of immunity with respect to the individual defendants. Second, defendants fail to identify precisely which of plaintiff's 19 counts contain tort claims with respect to which the individual defendants are purportedly entitled to governmental immunity. Instead, they assert governmental immunity with respect to "*any* claim based on a tort theory[.]" Third, defendants fail to recognize and apply the differing standards for determining governmental immunity that apply to negligent torts and individual torts. *Odom*, 482 Mich at 479-480. Fourth, defendants fail to analyze which of plaintiff's tort claims are negligent torts and which are intentional torts, and then to apply the correct standard to each claim. Again, plaintiff's complaint contains 19 counts; defendants fail to identify which of those counts contain tort claims, to address which of those torts are negligent torts and which are intentional torts, and then to apply the correct standard. For example, whereas count 16 alleges negligence, count 17 alleges intentional infliction of emotional distress. Yet defendants address only the gross negligence standard, and fail to mention the standard for intentional torts; then, incongruously, defendants assert entitlement to immunity with respect to "*any* claim based on a tort theory[.]"

Accordingly, defendants' assertion of governmental immunity with respect to the individual defendants is so deficient in so many respects that it is impossible to review. It is not this Court's role to develop and elaborate a party's argument. The issue is deemed abandoned as insufficiently briefed. *Sprague*, 284 Mich App at 243.

Next, defendants argue that the entity defendants are entitled to governmental immunity with respect to plaintiff's tort claims. We agree. "A governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." *Mack v Detroit*, 467 Mich 186, 197-198; 649 NW2d 47 (2002), citing MCL

691.1407(1). "[A] governmental function is any activity which is expressly or impliedly mandated or authorized by constitution, statute, or other law. Conversely, governmental agencies are not entitled to immunity . . . for injuries arising out of ultra vires activity, defined as activity *not* expressly or impliedly mandated or authorized by law." *Richardson v Jackson Co*, 432 Mich 377, 381; 443 NW2d 105 (1989) (internal quotation marks and brackets omitted; emphasis in original). "Improper performance of an activity authorized by law is, despite its impropriety, still authorized" for the purpose of governmental immunity. *Id*. at 385. "In sum, ultra vires activity is not activity that a governmental agency performs in an unauthorized manner. Instead, it is activity that the governmental agency lacks legal authority to perform in any manner." *Id*. at 387. The determination whether an activity was a governmental function must focus on the general activity rather than the specific conduct involved at the time the alleged injury occurred. *Ward v Mich State Univ (On Remand)*, 287 Mich App 76, 84; 782 NW2d 514 (2010).

Because governmental immunity is a characteristic of government, "[a] plaintiff filing suit against a governmental agency must initially plead his claims in avoidance of governmental immunity. Placing this burden on the plaintiff relieves the government of the expense of discovery and trial in many cases." *Odom*, 482 Mich at 478-479. Requiring a plaintiff to plead in avoidance of a governmental agency's immunity serves "a central purpose of governmental immunity, that is, to prevent a drain on the state's financial resources, by avoiding even the expense of having to contest on the merits any claim barred by governmental immunity." *Mack*, 467 Mich at 203 n 18. Pleading in avoidance of immunity may be accomplished by stating a claim that falls within a statutory exception to immunity[6] or by averring facts indicating that the pertinent act occurred during the exercise of a non-governmental or proprietary function. *Id*. at 199. "The scope of governmental immunity is construed broadly, while exceptions to it are construed narrowly." *Linton v Arenac Co Rd Comm*, 273 Mich App 107, 112; 729 NW2d 883 (2006). Governmental immunity extends only to tort claims. *Borg-Warner Acceptance Corp v Dep't of State*, 433 Mich 16, 19; 444 NW2d 786 (1989).

Here, the entity defendants are entitled to governmental immunity with respect to plaintiff's tort claims. Allen Park Ordinances, § 2-211 expressly authorizes the Board to "administer, manage and operate the retirement system[.]" Moreover, plaintiff has conceded the Board's legal authority to administer the retirement system. Thus, the operation of the retirement program comprises a governmental function because it is expressly or impliedly mandated or authorized by law. *Richardson*, 432 Mich at 381. Plaintiff has failed to state a claim that falls within a statutory exception to immunity or to plead any facts establishing that defendants engaged in ultra vires activities. Plaintiff argues that defendants failed to perform their duties in

[6] There are six statutory exceptions to governmental immunity: "the highway exception, MCL 691.1402; the motor-vehicle exception, MCL 691.1405; the public-building exception, MCL 691.1406; the proprietary-function exception, MCL 691.1413; the governmental-hospital exception, MCL 691.1407(4); and the sewage-disposal-system-event exception, MCL 691.1417(2) and (3)." *Wesche v Mecosta Co Rd Comm*, 480 Mich 75, 84 n 10; 746 NW2d 847 (2008).

a lawful manner and to properly administer the retirement program. But the determination whether an activity was a governmental function must focus on the general activity rather than the specific conduct involved when the injury occurred. *Ward*, 287 Mich App at 84. At most, plaintiff's allegations establish that defendants performed the activity in an improper manner, *not* that defendants lacked legal authority to perform the activity in any manner. Defendants did not lack authority to administer the retirement system. Plaintiff has thus failed to establish that defendants engaged in ultra vires conduct. See *Richardson*, 432 Mich at 387. Because plaintiff has failed to plead facts in avoidance of immunity with respect to the entity defendants, those defendants are entitled to summary disposition with respect to plaintiff's tort claims.

Next, defendants assert that the applicable statutes of limitations bar plaintiff's claims for breach of contract, breach of installment contract, breach of fiduciary duty, and unjust enrichment. "Under MCL 600.5807(8), an action to recover damages for breach of contract must be brought within six years of the time the claim first accrues." *Blazer Foods, Inc v Restaurant Props, Inc*, 259 Mich App 241, 245; 673 NW2d 805 (2003). Generally, "a cause of action for breach of contract accrues when the breach occurs, i.e., when the promisor fails to perform under the contract." *Id*. at 245-246. Defendants argue that plaintiff's breach of contract claim is barred by the statute of limitations because he claimed entitlement to a duty disability retirement effective on March 1, 2003, and did not file his complaint until more than six years later, on November 1, 2010.

However, defendants fail to address plaintiff's allegations that the breach of contract claim was revived in 2010 and that defendants fraudulently concealed the claim. In particular, plaintiff's complaint cited MCL 600.5866, which states:

> Express or implied contracts which have been barred by the running of the period of limitation shall be revived by the acknowledgement or promise of the party to be charged. But no acknowledgement or promise shall be recognized as effective to bar the running of the period of limitations or revive the claim unless the acknowledgement is made by or the promise is contained in some writing signed by the party to be charged by the action.

Plaintiff alleged that on or about May 7, 2010, the Board directed its attorney to provide acknowledgements to plaintiff in a letter, including acknowledgements that plaintiff was entitled to deferred retirement benefits retroactive to July 10, 2008, the date of plaintiff's application for benefits. According to plaintiff, this letter comprised a written acknowledgement of the terms of the expressed or implied contract between the Retirement System and plaintiff for his pension benefits, and revived the limitation period for plaintiff's contract claim, thus permitting plaintiff to maintain his breach of contract claim.

In addition, plaintiff's complaint cited case law regarding a common-law rule permitting revival of a contract claim. In particular, plaintiff cited *Yeiter v Knights of St Casimir Aid Society*, 461 Mich 493, 497; 607 NW2d 68 (2000), which states: "[A] partial payment restarts the running of the limitation period unless it is accompanied by a declaration or circumstance that rebuts the implication that the debtor by partial payment admits the full obligation." Plaintiff alleged that on October 14, 2010, defendants made a partial payment to plaintiff for his pension that was not accompanied by a declaration or circumstance that rebutted the implication that

defendants by partial payment admitted the full obligation. Plaintiff thus alleged that defendants' partial payment had revived the limitation period, permitting plaintiff to maintain his action.

Further, plaintiff's complaint cited MCL 600.5855, which states:

> If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

Plaintiff alleged that on September 29, 2008, he inquired about the status of his retirement in a letter to Mizzi, and received no response. Further, plaintiff asserted that defendants unlawfully failed to respond to numerous FOIA requests in 2009 and 2010. Plaintiff averred that defendants' refusal to provide requested documents during this time period amounted to intentional acts to fraudulently conceal the existence of claims.[7]

In arguing that plaintiff's breach of contract action is barred by the statute of limitations, defendants fail to address plaintiff's allegations regarding the statutory and common-law revival of his claim and the purported fraudulent concealment of his claim. Because defendants fail to present any argument challenging these allegations in the complaint, defendants' contention that the breach of contract claim is barred by the statute of limitations is unavailing.

Defendants assert that the breach of installment contract claim is improper because plaintiff is merely attempting to circumvent the six-year limitation period applicable to his breach of contract claim. Defendants fail to cite any authority in support of their argument regarding the installment contract. The argument is thus deemed abandoned as insufficiently briefed. *Sprague*, 284 Mich App at 243. In any event, defendants' argument must fail for the same reason discussed regarding the breach of contract claim, i.e., defendants fail to challenge plaintiff's allegations regarding statutory and common-law revival and fraudulent concealment.

Defendants argue that plaintiff's breach of fiduciary duty claim must fail because it was not filed within the applicable three-year limitation period. "The statute of limitations for breach of a fiduciary duty is three years." *Wayne Co Employees Retirement Sys v Wayne Co*, 301 Mich App 1, 67 n 37; 836 NW2d 279 (2013) lv pending. A claim for breach of fiduciary duty accrues when the beneficiary knew or should have known about the breach. *The Meyer and Anna Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 47; 698 NW2d 900 (2005). Defendants argue that plaintiff's breach of fiduciary duty claim relates to his separation from employment in February 2003, thus making this action filed in November 2010 untimely. However, defendants fail to address the fact that plaintiff's complaint

[7] As discussed above, the requested documents that exist were eventually provided to plaintiff, rendering his FOIA appeal moot.

alleged breaches of fiduciary duty with respect to conduct that occurred in 2008 and 2010, including: improperly deferring plaintiff's retirement benefits in 2008; failing to provide notice to plaintiff regarding his deferred retirement benefits in 2008; and intentionally failing to provide notice to plaintiff regarding discussions and determinations made by the Board in 2008 and 2010 that resulted in the denial and diminishment of plaintiff's retirement benefits. Defendants fail to present an argument that these alleged breaches of fiduciary duty that occurred within three years of the filing of this action may not be considered. Accordingly, defendants' argument fails to establish that the statute of limitations bars the breach of fiduciary duty claim.

Finally, defendants contend that the applicable statute of limitations bars the unjust enrichment claim. The statute of limitations for unjust enrichment claims is six years. See MCL 600.5813 ("All other personal actions shall be commenced within the period of 6 years after the claims accrue and not afterwards unless a different period is stated in the statutes."); MCL 600.5815 ("The prescribed period of limitations shall apply equally to all actions whether equitable or legal relief is sought. . . .").[8] Defendants assert that plaintiff's unjust enrichment claim is based on the Board's alleged failure to provide plaintiff with a disability retirement in March 2003, rendering untimely this action filed in November 2010. Count 8 of plaintiff's complaint presented an unjust enrichment claim "by way of alternative pleading in the event that the court finds that no express contract existed between [p]laintiff and [d]efendants." Plaintiff alleged that defendants have received the benefit of plaintiff's financial contributions and unpaid retirement benefits, and that it would be inequitable to allow defendants to retain this benefit without compensating plaintiff for his unpaid retirement benefits. Plaintiff argues that he has properly pleaded a claim for unjust enrichment occurring within three years before filing this action because defendants' unjust enrichment is continuing until plaintiff receives his duty disability benefits.

> In order to sustain the claim of unjust enrichment, plaintiff must establish (1) the receipt of a benefit by defendant from plaintiff, and (2) an inequity resulting to plaintiff because of the retention of the benefit by defendant. If this is established, the law will imply a contract in order to prevent unjust enrichment. However, a contract will be implied only if there is no express contract covering the same subject matter. [*Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003) (citations omitted).]

Defendants cite no authority to establish when an unjust enrichment claim accrues or to rebut the notion that an unjust enrichment is ongoing as the defendant continues to retain funds concerning which the plaintiff is allegedly entitled to periodic payments. An appellant may not leave it to this Court to search for authority to sustain or reject the party's position. This argument must be deemed abandoned as insufficiently briefed. *Sprague*, 284 Mich App at 243. We have located no authority addressing this specific issue in the unjust enrichment context. But see MCL

[8] Defendants cite *Martin v East Lansing Sch Dist*, 193 Mich App 166, 177; 483 NW2d 656 (1992), for the proposition that the statute of limitations for unjust enrichment claims is three years, but we find no such holding in *Martin*.

600.5827 (Unless provided otherwise in MCL 600.5829 to MCL 600.5838, a "claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results."). Defendants fail to present an argument challenging the proposition that a defendant's ongoing retention of benefits in this context is a continuing wrong that may extend the limitation period.

Affirmed in Docket Nos. 304507 and 304567. Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion, in Docket No. 312351. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly