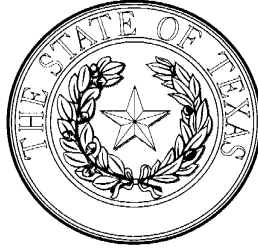


Opinion issued September 1, 2022



In The
Court of Appeals
For The
First District of Texas

NO. 01-21-00347-CV

LLOYD MERRELL, Appellant

V.

CITY OF SEALY, TEXAS AND CAROLYN BILSKI, MAYOR, Appellees

**On Appeal from the 155th District Court
Austin County, Texas
Trial Court Case No. 2021V-0027**

MEMORANDUM OPINION

Appellant Lloyd Merrell (“Merrell”) formerly served as the City Manager for the City of Sealy. After a dispute arose between Merrell and Appellees, the City of

Sealy (“City”) and Mayor Carolyn Bilski (“Mayor Bilski”), concerning the terms of Merrell’s employment agreement, Merrell filed suit against Appellees asserting numerous claims and seeking damages. Appellees filed a Plea to the Jurisdiction and a Rule 91 Motion to Dismiss, which the trial court granted. This appeal ensued.

In three issues, Merrell contends the trial court erred because (1) Texas Local Government Code Chapter 271 waives governmental immunity for his breach of contract claim, (2) his declaratory judgment action sounds in contract thereby invoking the waiver of immunity under Chapter 271, and (3) his ultra vires claim against Mayor Bilski concerns her failures to address violations of the City’s Charter and efforts to secure his resignation as City Manager, which actions exceeded her authority and conflicted with applicable law. We affirm.

Background

On February 1, 2018, Merrell began a one-year term of employment as City Manager for the City of Sealy. Merrell and former Mayor Janice Whitehead (“Mayor Whitehead”) executed a Compensation Agreement setting forth the terms and conditions of Merrell’s compensation and employment benefits. Pursuant to the City Charter and as reflected in the Compensation Agreement, the City Manager serves as the chief administrative officer of the City and is responsible for running

the day-to-day operations of city government. In this role, the City Manager has authority over a wide range of decisions including the appointment and removal of department heads and the management of the City's financial and operational stability.

In 2019, Merrell and Mayor Whitehead executed an amendment to the Compensation Agreement, effective February 1, 2019, increasing Merrell's salary and extending his employment term for two additional years. Following Mayor Whitehead's resignation,¹ Carolyn Bilski was elected as the City's Mayor in the November 2020 election.

A dispute arose soon thereafter between Appellees and Merrell concerning Merrell's role as City Manager and the actions of several City councilmembers. In December 2020, Merrell tendered his resignation during a City Council meeting. The City Council accepted Merrell's resignation and asked that he sign a Separation Agreement and General Release ("Separation Agreement").² Merrell did not sign the Separation Agreement. Instead, his counsel demanded severance pay, unpaid

¹ Mayor Whitehead resigned because she no longer resided within the City's limits.

² For the first time on appeal, Merrell argues that the City did not accept his resignation. We address his argument below.

compensation, unused sick leave, and vacation pay through the end of his contract term of January 31, 2021, arguing that Appellees' recent actions constituted a termination of his employment as City Manager. The City declined Merrell's demand and accelerated his last day of employment to January 5, 2021.

On March 4, 2021, Merrell sued the City and Mayor Bilski asserting claims for breach of contract, fraud, fraudulent inducement, fraud by non-disclosure, negligent misrepresentation, unjust enrichment, civil theft, conversion, and declaratory judgment. Merrell also asserted an ultra vires claim against Mayor Bilski claiming that her failures to address certain councilmembers' violations of the City's Charter and her efforts to secure his resignation as City Manager exceeded her authority and conflicted with applicable law. Merrell attached to his original petition copies of his Compensation Agreement, the Amendment to the Agreement, an article from the *Sealy News* dated December 3, 2020, the proposed Separation Agreement, the Minutes from the Sealy City Council Meeting on January 5, 2021, and his unsworn declaration.

In his original petition, Merrell alleged that newly elected Mayor Bilski had seized upon the City's economic downturn caused by the global pandemic as an opportunity to criticize the City's recent shift toward economic growth and

investments which Merrell had initiated. According to Merrell, Mayor Bilski blamed the shift for the City's recent economic woes. Merrell alleged that Mayor Bilski and various councilmembers fixated on the City's shrinking General Fund and the significant shortfalls in the City's sales tax receipts, both of which were the direct result of the City prioritizing public health policies designed to curb the spread of COVID-19, and pressed Merrell for answers to supply a quick fix. Merrell alleged that he provided detailed information and supporting data to explain the shortfall to Mayor Bilski and the councilmembers but that his explanations fell on deaf ears. Merrell alleged that Mayor Bilski and the councilmembers had made it clear they were targeting him as the sole reason for the City's shortfall without providing him a meaningful opportunity to respond to the assertions.

On November 30, 2020, the City Council held a special meeting to consider the method and form of evaluating the City Manager's performance. Near the conclusion of the meeting, and before City Council went into executive session, Merrell read a prepared statement into the record. He voiced his opposition to a number of recent actions taken by various councilmembers and led and encouraged by the Mayor. Merrell expressed concern that several councilmembers had directly contacted employees or department heads, without first notifying or consulting with

him, for the purpose of instructing those individuals to implement or heed certain policy changes or directives. In concluding his remarks, Merrell stated:

My contract expires on February 1, 2021 . . . I can't accept the current situation, and from questions at the last council meeting apparently the council has a problem with my administration. . . . I will honor the contract I signed with the city and expect the city to honor the contract they signed with me. If you are not content to let me do my job, then terminate me.

On December 1, 2020, the City Council conducted its regularly scheduled meeting. Merrell alleged that one of the councilmembers asked that her budget amendments be placed on the next meeting's agenda despite not having obtained any input from him. He alleged that this was the latest attempt to delegitimize his role as City Manager rendering his authority as City Manager functionally and effectively nonexistent. Merrell alleged that he was forced to make a choice: either (1) continue as City Manager through the end of his term during which time he would be serving in name only while subjecting himself to public humiliation and baseless challenges to his integrity, or (2) resign thereby preserving at least some measure of dignity and self-respect. Merrell asked the City Council to go into executive session and indicated his willingness to resign. In response, Mayor Bilski scheduled a meeting for December 14, 2020.

During the December 14th meeting, Merrell read a short statement into the record, resigning effective February 1, 2021. Merrell alleged that the City Council confirmed it would accept his resignation effective February 1, 2021, and that he would be paid his remaining salary, unused vacation, and sick time through January 31, 2021, the end of his contract term. Merrell alleged that City Council then produced a Separation Agreement and General Release (“Separation Agreement”) and instructed him to sign it immediately. Merrell alleged that when he expressed reluctance to sign it without first having an opportunity to review it, City Council gave him seven days to sign after which the proposed terms would be rescinded.

Merrell alleged that, on January 5, 2021, his attorney sent a letter to the City Council and Mayor Bilski advising them that their recent actions had constituted a termination of his employment as City Manager before the December 14, 2020 meeting at which he had tendered his resignation. Merrell demanded severance pay in an amount equal to sixteen weeks’ compensation as well as all unpaid compensation, unused sick leave, and vacation pay through the end of his contract term of January 31, 2021, pursuant to Section 16 of the Amendment to the Compensation Agreement.

The City declined Merrell's demand for full severance pay as reflected in the minutes of the City's Council's January 5, 2021 meeting:

Councilman Noack stated, "On December 14, 2020 the council received and accepted the resignation of City Manager Lloyd Merrell and moved that he be placed on paid administrative leave and provided with a separation agreement. As Mr. Merrell has not signed and returned the agreement which was provided to him through our attorney, I now move that the City rejects the proposal that was received today by Mr. Merrell's attorney, waives any notice period owed to him under his employment agreement, that his resignation having been previously accepted now be accelerated, and that his last date of employment be today, January 5, 2021." Councilwoman Sullivan seconded the motion. Mayor Bilski called for the vote:

AYES: Bilski, Lerma, Noack, Vrablec, Sullivan, Koy, Burttschell

NOES: None

The motion carried.

On April 20, 2021, the City and Mayor Bilski filed a Plea to the Jurisdiction arguing that, under the Compensation Agreement, Merrell was entitled to severance pay and compensation for unused sick and vacation pay through the end of his contact term only if the City fired him or if Merrell served as City Manager through January 31, 2021, the period set forth in his Compensation Agreement. They argued that because Merrell resigned from his position as City Manager on December 14, 2020, he was not entitled to any severance pay or compensation for unused sick and

vacation pay through the term of his contract. They argued there was no payment owed to Merrell and therefore no “balance due” under the Compensation Agreement. Consequently, Merrell could not demonstrate a waiver of the City’s immunity for his breach of contract claim under Chapter 271 of Texas Local Government Code.

Appellees argued that Merrell’s claim for declaratory judgment was likewise fatal because the substance of his claim was identical to his breach of contract claim which did not confer jurisdiction on the trial court. They argued Merrell could not circumvent governmental immunity by recharacterizing his breach of contract claim as a request for declaratory relief. Appellees further argued that Merrell’s tort claims for fraudulent inducement, fraud by non-disclosure, negligent misrepresentation, unjust enrichment, theft, and conversion were also barred by the City’s immunity from suit, and that there is no waiver of immunity for a claim of unjust enrichment.

Last, Appellees contended that Merrell’s ultra vires claim against Mayor Bilski failed as a matter of law because Merrell alleged only that a government official failed to comply with a contract and such a claim does not meet the stringent requirements of an ultra vires claim. They further argued that Merrell could not show that Mayor Bilski was the responsible government official for any alleged act because the City, not the Mayor, entered into the Compensation Agreement with

him. Appellees argued that Merrell failed to demonstrate a waiver of immunity for any of his claims and therefore the trial court lacked subject matter jurisdiction over his suit.

Although Appellees initially set their Plea to the Jurisdiction for oral hearing, the trial court later set it for hearing by written submission on May 11, 2021. Merrell filed an opposed motion for continuance or, alternatively, motion for enlargement of time to file a response to the Appellees' Plea to the Jurisdiction. The trial court granted Merrell's motion for a thirty-day continuance.

On May 7, 2021, Appellees filed a Rule 91a Motion to Dismiss Merrell's claims for lack of subject matter jurisdiction. In addition to reiterating the arguments raised in their Plea, Appellees asserted that the mere fact the City chose to reject Merrell's offer to continue working until the end of his term did not constitute a termination of his employment for purposes of Merrell's breach of contract claim. With regard to Merrell's ultra vires claim, Appellees argued additionally that Merrell's claim failed to allege that Mayor Bilski acted without legal authority or failed to perform a ministerial act as required to fall within the ultra vires exception to governmental immunity.

Merrell responded to Appellees' Plea arguing his suit was not barred by governmental immunity because his claims arose out of proprietary, not governmental acts. And even if the complained-of acts could be construed as governmental acts, he argued immunity was inapplicable and waiver was not required because his lawsuit alleged violations of due-course-of-law protections set forth in Article I, Section 19 of the Texas Constitution and performance of ultra vires acts. Merrell also asserted that even if immunity applied to his claims, Appellees had waived immunity under Sections 271.151–.52 of the Texas Local Government Code and by virtue of executing the Compensation Agreement. Merrell reiterated these arguments in his response to Appellees' Rule 91a Motion to Dismiss. Merrell further argued that Appellees' actions had resulted in his constructive discharge long before he tendered his resignation.

Appellees filed a reply in support of their Rule 91a Motion and Plea to the Jurisdiction. They argued that Merrell's claim that the City had constructively discharged him by evaluating him and criticizing his job performance could not support a constructive discharge finding. They argued that Merrell also failed to demonstrate a waiver of the City's immunity under Chapter 271 of the Texas Local

Government Code and that his attempts to circumvent governmental immunity based on the additional insupportable theories also failed.

On June 8, 2021, the trial court entered orders granting Appellees' Plea to the Jurisdiction and Rule 91a Motion to Dismiss dismissing Merrell's claims with prejudice. This appeal followed.

Discussion

Merrell raises three issues on appeal. First, he contends the trial court erred in dismissing his breach of contract claim because Texas Local Government Code Chapter 271 waives governmental immunity for his claim. Second, he argues the trial court erred in dismissing his declaratory judgment action because his claim sounds in contract and thus immunity is waived under Chapter 271. Third, Merrell asserts the trial court erred in dismissing his ultra vires claim against Mayor Bilski because her failures to address violations of the City's Charter and efforts to secure his resignation as City Manager exceeded her authority and conflicted with applicable law.³

³ Merrell does not argue that the trial court erred in dismissing his fraud, fraudulent inducement, fraud by non-disclosure, negligent misrepresentation, unjust enrichment, civil theft, and conversion claims and has therefore waived those complaints for appellate review.

A. Standards of Review and Applicable Law

1. Plea to the Jurisdiction

Subject matter jurisdiction is essential to a court's jurisdiction to decide a case. *City of Houston v. Rhule*, 417 S.W.3d 440, 442 (Tex. 2013). A plea to the jurisdiction is a dilatory plea that seeks dismissal of a case for lack of subject matter jurisdiction. *Harris Cnty. v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004); *TitleMax of Tex., Inc. v. City of Austin*, 639 S.W.3d 240, 245 (Tex. App.—Houston [1st Dist.] 2021, no pet.). The plaintiff bears the burden of demonstrating the trial court has subject matter jurisdiction over his case. *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 550 (Tex. 2019).

If the plea to the jurisdiction challenges the pleadings, we liberally construe the pleadings to determine if the plaintiff has “alleged facts that affirmatively demonstrate the court’s jurisdiction to hear the cause.” *Hous. Belt & Terminal Ry. Co. v. City of Hous.*, 487 S.W.3d 154, 160 (Tex. 2016) (internal quotations omitted). If the plea to the jurisdiction challenges the existence of jurisdictional facts, which also implicate the merits of the case, “we consider relevant evidence submitted by the parties to determine if a fact issue exists.” *Suarez v. City of Tex. City*, 465 S.W.3d 623, 632–33 (Tex. 2015). “We take as true all evidence favorable to the nonmovant,

indulge every reasonable inference, and resolve any doubts in the nonmovant's favor." *Id.* at 633. "If the evidence creates a fact question regarding jurisdiction, the plea must be denied pending resolution of the fact issue by the fact finder." *Id.* "If the evidence fails to raise a question of fact, however, the plea to the jurisdiction must be granted as a matter of law." *Id.*; *see also Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226–28 (Tex. 2004).

We review a trial court's ruling on a plea to the jurisdiction de novo. *See Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Political Subdivs. Prop./Cas. Joint Self-Ins. Fund*, 212 S.W.3d 320, 323 (Tex. 2006); *City of Hous. v. Vallejo*, 371 S.W.3d 499, 501 (Tex. App.—Houston [1st Dist.] 2012, pet. denied). Our de novo review looks to the pleader's intent and construes the pleadings in its favor. *Vallejo*, 371 S.W.3d at 501.

Sovereign immunity and its counterpart for political subdivisions, governmental immunity, protect the State and its political subdivisions, including counties, cities, and municipalities, from lawsuits and liability for money damages. *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 655 & n.2; *see also Reata Constr. Corp. v. City of Dall.*, 197 S.W.3d 371, 374 (Tex. 2006). "Sovereign immunity from suit defeats a trial court's subject matter jurisdiction and thus is

properly asserted in a plea to the jurisdiction.” *Miranda*, 133 S.W.3d at 225–26. Absent waiver, governmental entities retain immunity from suit. *Tex. Nat. Res. Conservation Comm’n v. IT-Davy*, 74 S.W.3d 849, 853 (Tex. 2002). The City of Sealy is a local government entity. TEX. LOC. GOV’T CODE § 271.151(3) (defining “local governmental entity” as political subdivisions of state, other than county or unit of state government, including municipalities, public school and junior college districts, and various special purpose districts and authorities).

2. Rule 91a Motion to Dismiss

Texas Rule of Civil Procedure 91a provides that “a party may move to dismiss a cause of action on the grounds that it has no basis in law or fact.” TEX. R. CIV. P. 91a.1. A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the plaintiff to the relief sought. *Stallworth v. Ayers*, 510 S.W.3d 187, 189–90 (Tex. App.—Houston [1st Dist.] 2016, no pet.). The trial court must determine the motion “based solely on the pleading of the cause of action, together with any pleading exhibits permitted by” the rules of civil procedure. TEX. R. CIV. P. 91a.6; *Dailey v. Thorpe*, 445 S.W.3d 785, 788 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (citing TEX. R. CIV. P. 91a.6).

We review a trial court’s ruling dismissing a case under Rule 91a de novo. *City of Dall. v. Sanchez*, 494 S.W.3d 722, 724 (Tex. 2016); *Walker v. Owens*, 492 S.W.3d 787, 789 (Tex. App.—Houston [1st Dist.] 2016, no pet.). We construe the pleadings liberally in favor of the plaintiff, look to the plaintiff’s intent, and accept as true the factual allegations in the pleadings to determine if the cause of action has a basis in law or fact. *Wooley v. Schaffer*, 447 S.W.3d 71, 75 (Tex. App.—Houston [14th Dist.] 2014, pet. denied).

B. Breach of Contract Claim

In his first issue, Merrell contends the trial court erred in dismissing his breach of contract claim because the City’s governmental immunity is waived under the provisions of Chapter 271 of the Texas Local Government Code. Appellees argue that Merrell’s allegations do not fall within Chapter 271’s limited waiver of immunity because there is no “balance due” under Merrell’s employment contract.

1. Texas Local Government Code Chapter 271

Sections 271.152 and 271.153 of Texas Local Government Code provide, in relevant part:

§ 271.152. Waiver of Immunity to Suit for Certain Claims

A local governmental entity that is authorized by statute or the constitution to enter into a contract and that enters into a contract

subject to this subchapter waives sovereign immunity to suit for the purpose of adjudicating a claim for breach of the contract, subject to the terms and conditions of this subchapter.

TEX. LOC. GOV'T CODE § 271.152.

§ 271.153. Limitations on Adjudication Awards

(a) Except as provided by Subsection (c), the total amount of money awarded in an adjudication brought against a local governmental entity for breach of a contract subject to this subchapter is limited to the following:

- (1) the balance due and owed by the local governmental entity under the contract as it may have been amended

Id. § 271.153. The Texas Supreme Court has stated that “the Act does not waive immunity from suit on a claim for damages not recoverable under Section 271.153.” *Zachry Const. Corp. v. Port of Hous. Auth. of Harris Cnty.*, 449 S.W.3d 98, 110 (Tex. 2014). Thus, to determine whether Merrell’s breach of contract claim falls within the limited waiver of immunity under Section 271.153, we must decide whether there is a “balance due and owed” by the City under the Compensation Agreement.

2. Compensation Agreement

Section 2 of the Compensation Agreement provides that “[t]he City Manager [] shall serve at the pleasure of the Mayor and City Council for an indefinite term

and may be removed at the will and pleasure of the city council by a vote of the majority of the entire council.” The Agreement also provides, in pertinent part, as follows:

Section 13. Termination. Subject to the terms and conditions hereinafter set forth, the City may terminate the employment of Merrell under this Agreement and discharge him at any time, with or without cause. Likewise, Merrell may terminate his employment under this Agreement and resign by giving the City Council notice in writing at least sixty (60) days prior to the effective date of such termination and resignation.

Section 14. Agreement Term Concluded. In the event that either the City or Merrell, at the conclusion of the term for compensation and benefits provided herein (“Agreement”), elects to terminate the employment relationship for whatever reason, the City shall not be obligated to pay to Merrell and Merrell shall not be entitled to receive from City any termination or severance pay as provided below; however, regardless of timing, at the end of the employment relationship between Merrell and the City, Merrell shall be entitled to any compensation, including accrued unused vacation and sick leave, earned by him during the term of this Agreement. All provisions of policies, rules and regulations of the City now existing or hereafter amended shall be applicable to the calculation of unused vacation and sick leave.

Section 15. Termination for Cause. If during the Agreement term, City should terminate the employment of Merrell and discharge him “for cause,” as such term is hereinafter defined, or should Merrell terminate his employment and resign, City shall not be obligated to pay to Merrell and Merrell shall not be entitled to receive from City any compensation or benefits, including termination or severance pay; however, in such event, Merrell shall be entitled to any compensation, including accrued unused vacation and sick leave, earned by him during

the term of this Agreement up to the date of termination. All provisions of policies, rules and regulations of the City now existing or hereafter amended shall be applicable to the calculation of unused vacation and sick leave.

As used herein and as it relates to City's termination of employment and discharge of Merrell, the term "for cause" shall mean misfeasance or malfeasance in office, criminal conduct constituting a felony or misdemeanor involving moral turpitude, breach of this Agreement by Merrell, willful breach or habitual neglect of duties by Merrell, as such duties are described in this Agreement or in the City's Charter, the death of Merrell, or a physical or mental disability of Merrell which precludes or prevents him from performing such duties for a period of at least ninety (90) consecutive days.

Section 16. Termination Without Cause Other Than At Term End.

If prior to the end of the term for the compensation and benefits provided herein, the City should terminate the employment of Merrell under this Agreement and discharge him without cause, City shall be obligated to pay to Merrell and Merrell shall be entitled to receive from City, as termination and severance pay, twelve (12) weeks salary and any accrued unused vacation and sick leave, earned by him during the term of this Agreement, up to the date of termination. All provisions of policies, rules and regulations of the City now existing or hereafter amended shall be applicable to the calculation of unused vacation and sick leave.

3. Analysis

In their Plea to the Jurisdiction and Rule 91a Motion to Dismiss, Appellees argued that under the terms of the Compensation Agreement Merrell is entitled to severance pay and compensation for unused sick time or vacation accrued through the term of his contract only if the City fires Merrell (Section 16) or if Merrell serves

as City Manager through the period set forth in his contract, January 31, 2021 (Section 14). Appellees contend neither occurred. Pointing to Merrell’s admission in his original petition that, on December 14, 2020, before he completed the term of his employment contract, he resigned from his position as City Manager, Appellees assert that under Section 15 of the Compensation Agreement (“If during the agreement term . . . should Merrell terminate his employment and resign, City shall not be obligated to pay to Merrell and Merrell should not be entitled to receive from City any compensation or benefits, including termination or severance”) there is no “balance due and owed” by the City as required for a claim under Chapter 271.

In response, Merrell argues that Appellees’ assertion that he is not entitled to receive severance pay and compensation for unused vacation and sick time because he resigned from his position as City Manager fails because the City never accepted his offer of resignation and thus his contractual right to compensation remained in effect. Merrell argues that in his pleadings he alleged that during the December 14, 2020 council meeting:

[H]e offered to resign at the end of the term for his amended compensation agreement on February 1, 2021. His indication of willingness to voluntarily resign in exchange for compensation through the remainder of his term and payment for unused time off was an offer to modify his contract with Sealy, and Sealy made its acceptance subject to [his] execution of the Separation Agreement presented to him

at the December 14th meeting. By requiring [his] execution of the Separation Agreement before it would be obligated to perform as agreed, Sealy imposed a condition precedent to contract formation. . . . [His] subsequent refusal on the advice of counsel to execute the Separation Agreement meant that the new/amended contract between the parties was never accepted, thus leaving the parties in the same relative contractual positions they occupied before [his] offer to resign.”

Merrell did not make this argument below. He advances the issue of offer, acceptance, and his execution of the Separation Agreement for the first time on appeal. Even if proper at this stage, Merrell’s petition does not support his argument.

Contrary to his characterization on appeal, in his petition, Merrell alleged that:

31. During the December 14, 2020 meeting, Mr. Merrell read a short statement into the record resigning effective February 1, 2021. The City Council then went into executive session and shortly thereafter, called Merrell into the room where they confirmed they would accept his resignation effective February 1, 2021 and confirmed that accordingly, he would be paid his remaining salary, and unused vacation and sick time through January 31, 2021.

These allegations do not demonstrate that Merrell *offered* to resign or that he *indicated a willingness* to voluntarily resign in exchange for compensation through the remainder of his term and payment for unused time off, and that such an indication was an offer to modify his contract. Rather, Merrell’s allegations are that he resigned and the City accepted his resignation. Nor do the allegations in Merrell’s petition indicate that the City conditioned its acceptance of his resignation on his

execution of the Separation Agreement. Rather, the allegations are that the councilmembers went into executive session and then informed Merrell they would accept his resignation. That the City subsequently asked Merrell to sign a Separation Agreement which he later rejected does not alter the fact that he resigned his position as City Manager and the City accepted his resignation.

This conclusion is further supported by Councilman Noack's statement at the January 5, 2021 City Council meeting as set forth in Merrell's petition:

On December 14, 2020 the council received and accepted the resignation of City Manager Lloyd Merrell and moved that he be placed on paid administrative leave and provided with a separation agreement. As Mr. Merrell has not signed and returned the agreement which was provided to him through our attorney, I now move that the City rejects the proposal that was received today by Mr. Merrell's attorney, waives any notice period owed to him under his employment agreement, that his resignation having been previously accepted now be accelerated, and that his last date of employment be today, January 5, 2021.

In a footnote, Merrell asserts that even if he were deemed to have effectively resigned, he still retained the right to assert a claim for breach of contract under Chapter 271's waiver of immunity based on constructive discharge. An employee is constructively discharged when "the employer ma[kes] the working conditions so intolerable that a reasonable person would feel compelled to resign." *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 805 (Tex. 2010). The key inquiry for constructive

discharge does not focus on whether a particular employee felt compelled to resign; instead, it focuses on whether a reasonable employee would have felt compelled to do so. *Cox v. Waste Mgmt. of Tex., Inc.*, 300 S.W.3d 424, 435 (Tex. App.—Fort Worth 2009, pet. denied) (noting constructive discharge claim is analyzed using reasonable-person test, not employee’s subjective opinions). The inquiry addresses the conditions imposed, not the employer’s state of mind. *Nezat v. Tucker Energy Servs., Inc.*, 437 S.W.3d 541, 546 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

Whether a reasonable employee would feel compelled to resign depends on the facts of each case, but factors bearing on this determination include (1) demotion; (2) reduction in salary; (3) reduction in job responsibilities; (4) reassignment to menial or degrading work; (5) badgering, harassment, or humiliation by the employer calculated to encourage the employee’s resignation; and (6) offers of early retirement that would make the employee worse off whether the offers were accepted or not. *See Gardner v. Abbott*, 414 S.W.3d 369, 383 (Tex. App.—Austin 2013, no pet.) (affirming trial court’s granting of State’s motion for summary judgment on employee’s claim that he was constructively discharged because of sexual orientation). “In addition, evidence that an employee was forced to choose between

resigning or being fired may be sufficient to raise a fact issue regarding constructive discharge.” *Id.*

In this case, there are no allegations of demotion, reduction in salary, reassignment to menial or degrading work, or offers of early retirement. There is also no allegation that Merrell was forced to choose between being fired and resigning. Instead, Merrell argues that he alleged a reduction in his job responsibilities and that he was badgered and humiliated and that these allegations demonstrate that he was compelled to resign. In support of his assertion, he points to the following allegations in his petition: (1) Mayor Bilski’s public criticism of the initiatives he supported during her mayoral campaign; (2) Mayor Bilski’s indications that, if elected, she would actively oppose those initiatives; (3) attempts by councilmembers to directly contact city employees and department heads (without first notifying Merrell, and in apparent violation of § 3.06(C) of the City Charter) to instruct them on policy changes or directives; (4) questioning by Mayor Bilski and other councilmembers at a November 2020 meeting regarding his approval of de minimis expenditures, culminating in one councilmember openly questioning Merrell’s judgment; (5) Councilmember Chris Noack’s assertion at the November 30, 2020 public council meeting that things he had seen “lessen[ed] his trust” in city

staff (in apparent reference to Merrell's approval of the \$400 expenditure for purchase and installation of a stove in the planning department).

Merrell's first two allegations—that Mayor Bilski publicly criticized the initiatives he supported during her mayoral campaign and indicated that, if elected, she would actively oppose those initiatives—describe conduct that occurred during Mayor's Bilski's mayoral campaign and before she was elected. As such, they cannot constitute the actions of Merrell's employer. Merrell's additional allegation that councilmembers attempted to contact city employees and department heads directly to instruct them on policy changes or directives without notifying him first suggests a circumvention of his authority as City Manager by certain councilmembers rather than a reduction of his job responsibilities. *Cf. Stephens v. C.I.T. Grp./Equip. Fin., Inc.*, 955 F.2d 1023, 1027 (5th Cir. 1992) (concluding evidence showing, among other things, that plaintiff who was demoted from position as division head to district sales manager had no supervisory duties in new position and that employer put continuing limitations on employee's salary and job responsibilities was sufficient to demonstrate constructive discharge).

Merrell's remaining allegations similarly fail to support a constructive discharge claim. His allegations that Mayor Bilski and councilmembers questioned

his approval of de minimis expenditures resulting in a councilmember openly questioning Merrell’s judgment at a November 2020 meeting and Councilmember Noack’s assertion that he had seen things that “lessen[ed] his trust” in city staff, cannot reasonably be construed as badgering and humiliation by an employer that was calculated to encourage an employee to resign. *See Microsoft Corp. v. Mercieca*, 502 S.W.3d 291, 313 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (concluding employee’s complaint that his employer harassed him by placing him on weekly performance reviews with his manager indicating that he was being given unwarranted extra scrutiny and his exclusion from two meetings could not be reasonably construed as evidence of badgering, harassment, or humiliation by employer calculated to encourage employee to resign from his job); *Wal-Mart Stores, Inc. v. Bertrand*, 37 S.W.3d 1, 9 (Tex. App.—Tyler 2000, pet. denied) (“An unfavorable work evaluation does not support a constructive discharge claim.”); *see also Haley v. Alliance Compressor LLC*, 391 F.3d 644, 650–52 (5th Cir. 2004) (holding that “management fabricating deficiencies in [employee]’s work performance and setting an overly strict performance plan for her; threatening to fire her if she did not meet her teamwork goals; micromanaging her; excluding her from HR Department meetings; and ridiculing her in front of her coworkers” was not

sufficient evidence of constructive discharge). Merrell has not alleged facts demonstrating he was constructively discharged.

Because Merrell resigned from his employment thus triggering Section 15 of the Compensation Agreement under which the City “shall not be obligated to pay to Merrell and Merrell should not be entitled to receive from City any compensation or benefits, including termination or severance,” he cannot establish that a “balance was due and owed” to him. Because there is no balance due and owed under the Compensation Agreement as required to demonstrate a waiver of the City’s immunity under Chapter 271, the trial court lacked jurisdiction over Merrell’s breach of contract claim. *See Suarez*, 465 S.W.3d at 631.

We overrule Merrell’s first issue.

C. Declaratory Judgment

In his second issue, Merrell contends the trial court erred in dismissing his declaratory judgment action. In his petition, Merrell sought a declaratory judgment against Appellees that:

- a. Pursuant to the terms of the Original Contract and the Amended Contract, Mr. Merrell was terminated Without Cause Other Than At Term End, as defined in Section 16 of the Amended Contract and as such, he is entitled to severance pay in the amount of sixteen (16) weeks salary and is also entitled to any accrued unused vacation and sick leave

which he earned during the term of the Agreement, up to the date of termination;

b. Defendants breached the terms of the Original Contract and Amended Contract by failing to pay Mr. Merrell the full amount of severance, compensation and unused vacation and sick leave to which Mr. Merrell was entitled to receive;

c. Defendants are not entitled to retain possession of the monies which should have been paid to Mr. Merrell pursuant to the Original Contract and Amended Contract;

d. Defendants failed to uphold its obligations pursuant to the Texas City Charter, Code of Ordinances and as required by the Original Contract and Amended Contract by unlawfully usurping Mr. Merrell's authority, removing Mr. Merrell as City Manager without documenting the basis for the same, and by failing to document and maintain records including recordings of City Council meetings concerning the City's business affairs.

e. Defendants failed to provide Mr. Merrell with adequate notice and due process afforded by the Texas Constitution.

Merrell argues that the substance of his claim, *i.e.*, his entitlement to severance and the City's breach of the Compensation Agreement in failing to pay him severance, establishes waiver of the City's government immunity under Chapter 271. Thus, he argues, Appellees were not entitled to dismissal of his declaratory judgment action. Appellees respond that the trial court properly dismissed Merrell's request for declaratory relief because it is identical to his breach of contract claim which does not effect a waiver of the City's immunity.

The Uniform Declaratory Judgments Act (UDJA) “does not enlarge a court’s jurisdiction; it is a procedural device for deciding cases already within a court’s jurisdiction.” *City of Dall. v. Albert*, 354 S.W.3d 368, 378 (Tex. 2011); *IT-Davy*, 74 S.W.3d at 855 (“The [U]DJA does not extend a trial court’s jurisdiction, and a litigant’s request for declaratory relief does not confer jurisdiction on a court or change a suit’s underlying nature.”). Consistent with this principle, a party cannot circumvent governmental immunity by characterizing a suit for money damages as a claim for declaratory judgment. *Albert*, 354 S.W.3d at 378 (citing *City of Hous. v. Williams*, 216 S.W.3d 827, 828–29 (Tex. 2007)).

Based on the plain language of Section 271.152, the Legislature has not expressly and unambiguously waived immunity from suit for a declaratory judgment claim. *Lower Colo. River Auth. v. City of Boerne*, 422 S.W.3d 60, 67 (Tex. App.—San Antonio 2014, pet. dismiss’d) (affirming trial court’s order granting city’s plea to jurisdiction on plaintiff’s declaratory judgment claim where plaintiff had also asserted related breach of contract claim against city). Rather, Chapter 271 waives immunity only for suits that seek the remedies specifically set out in the statute. *Tooke v. City of Mexia*, 197 S.W.3d 325, 345 (Tex. 2006); *City of Pearsall v. Tobias*, No. 04-15-00302-CV, 2016 WL 1588400, at *3 (Tex. App.—San Antonio Apr. 20,

2016, pet. denied) (mem. op.). In determining whether a plaintiff's claims are barred by immunity, courts look to the substance of the claims alleged because governmental immunity cannot be circumvented by artful pleading. *Hidalgo Cnty. v. Dyer*, 358 S.W.3d 698, 704 (Tex. App.—Corpus Christi—Edinburg 2011, no pet.); see *Univ. of Tex. M.D. Anderson Cancer Ctr. v. McKenzie*, 578 S.W.3d 506, 513 (Tex. 2019) (“In determining whether a plaintiff has stated a claim for use of tangible personal property, we look to the true nature of the dispute—a plaintiff may not expand the [TTCA's] limited waiver through artful pleading.”).

Merrell acknowledges that the substance of his declaratory judgment action consists of his entitlement to severance pay and any accrued unused vacation and sick leave under the Compensation Agreement and the City's breach of the terms of the Compensation Agreement. Merrell's request for declaratory relief mirrors his breach of contract claim brought under Chapter 271 alleging that the City breached the Compensation Agreement by failing to pay him the “balance due” under the contract.⁴ Because Merrell's breach of contract claim does not confer jurisdiction

⁴ Under (d) and (e) of his declaratory judgment action, Merrell sought a declaration that Appellees failed to uphold their obligations under the City Charter and Code of Ordinances and the Compensation Agreement and Amendment by removing him as City Manager without documenting the basis for his removal, failing to document and maintain records including recordings of City Council meetings concerning the

on the trial court, he may not circumvent the City's governmental immunity by recharacterizing his breach of contract claim as a request for declaratory relief. *See Albert*, 354 S.W.3d at 378; *Williams*, 216 S.W.3d at 828–29. The trial court did not err in granting the City's plea to the jurisdiction on Merrell's declaratory judgment action.

We overrule Merrell's second issue.

D. Ultra Vires Claim

In his third issue, Merrell contends the trial court erred in dismissing his ultra vires claim against Mayor Bilski. He argues that her failures to address violations of the City's Charter by councilmembers and her efforts to secure his resignation as City Manager exceeded her authority and conflicted with applicable law. Appellees argue that Merrell failed to allege any facts showing Mayor Bilski acted without legal authority or that she even acted at all.

City's business affairs, and failing to provide him with adequate notice and due process afforded by the Texas Constitution. Aside from one sentence in a footnote in the Statement of Facts section of his brief stating that "if Sealy wanted to terminate Merrell for cause, Merrell was entitled to procedural due process before the city could deny him severance pay owed under the Compensation Agreement," Merrell does not brief these arguments in his issue challenging the denial of his request for declaratory relief. Instead, Merrell frames the substance of his declaratory action claim as his entitlement to severance pay and any accrued unused vacation and sick leave under the Compensation Agreement and the City's breach of the terms of the Compensation Agreement.

A claim may proceed against a governmental official in her official capacity if the plaintiff successfully alleges that the official is engaging in ultra vires conduct. *Chambers-Liberty Cnty. Navigation Dist. v. State*, 575 S.W.3d 339, 344 (Tex. 2019); *Hall v. McRaven*, 508 S.W.3d 232, 238 (Tex. 2017); *Town Park Ctr., LLC v. City of Sealy*, 639 S.W.3d 170, 195 (Tex. App.—Houston [1st Dist.] 2021, no pet.). A plaintiff bringing an ultra vires claim must allege and ultimately prove that the official acted without legal authority or failed to perform a purely ministerial act. *Chambers-Liberty Cnty. Navigation Dist.*, 575 S.W.3d at 344–45 (quoting *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009)). A government officer with some discretion to interpret and apply a law may nevertheless act without legal authority—and thus act ultra vires—if the officer exceeds the bounds of her granted authority or if her acts conflict with the law itself. *Hall*, 508 S.W.3d at 238; *Hous. Belt & Terminal Ry.*, 487 S.W.3d at 164 (“[G]overnmental immunity only extends to those government officers who are acting consistently with the law, which includes those who act within their granted discretion.”). “Ministerial acts” are those “where the law prescribes and defines the duties to be performed with such precision and certainty as to leave nothing to the

exercise of discretion or judgment.” *Hall*, 508 S.W.3d at 238 (quoting *Sw. Bell Tel., L.P. v. Emmett*, 459 S.W.3d 578, 587 (Tex. 2015)).

In his petition, Merrell alleged that at the November 30, 2020 special meeting, he expressed concern that several councilmembers had directly contacted employees or department heads, without first notifying or consulting with him, for the purpose of instructing those individuals to implement or heed certain policy changes or directives. Merrell asserts that the councilmembers’ actions in directly contacting City officers and employees without first going through Merrell as City Manager violated Section 3.06(C) of the City Charter.⁵ He argues that, under Section 3.04 of the City Charter, Mayor Bilski was required to “see that all ordinances, regulations, and resolutions of the city council are faithfully obeyed and enforced,” and that she

⁵ Section 3.06(C) states:

Interference with administration. Except for the purpose of inquiries and investigations authorized by this Charter, the city council or its members shall deal with city officers and employees who are subject to the direction and supervision of the city manager solely through the city manager, and neither the city council, the mayor, nor a councilmember may give orders publicly or privately to any such officer or employee.

SEALY, TEX., CODE OF ORDINANCES art. III, § 3.06(C) (2022).

failed to perform this ministerial act by ignoring, and tacitly endorsing, the councilmembers' improper contact.⁶

Appellees argue that the mere fact that Section 3.04 requires the mayor to “see that all ordinances, regulations, and resolutions of the city council are faithfully obeyed and enforced” does not define the “duties to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment.” We agree.

Section 3.04 does not specify what the Mayor must do to ensure that ordinances, regulations, and resolutions are obeyed and enforced. *See Brown v. Daniels*, No. 05-20-00579-CV, 2021 WL 1997060, at *17 (Tex. App.—Dallas May 19, 2021, no pet.) (mem. op.) (concluding that statutes relied on by plaintiffs did not require sheriff to act with requisite certainty or specificity to support ultra vires claim based on sheriff's alleged failure to perform ministerial act). Merrell argues that Section 3.04 required Mayor Bilski “to correct the councilmembers' interference with Merrell's administration.” But Section 3.04 says nothing about corrective measures much less does it identify with specificity what those corrective

⁶ Section 3.04 of the City Charter states, in part: “The mayor shall see that all ordinances, regulations, and resolutions of the city council are faithfully obeyed and enforced.” *Id.* § 3.04.

measures are. Liberally construing the pleadings in Merrell's favor, as we must, his allegations that Mayor Bilski failed to correct unidentified city councilmembers who directly contacted unidentified employees or department heads, without first notifying or consulting with him, for the purpose of instructing those individuals to implement or heed unidentified policy changes or directives do not allege facts demonstrating an ultra vires act.

Alternatively, Merrell alleges that in the event his resignation was legally binding, Mayor Bilski and those councilmembers acting in concert with her unlawfully secured his resignation through constructive discharge. He argues that Mayor Bilski was not legally authorized to engage in this course of conduct, as her role in securing his resignation was in itself unlawful, both as a violation of state law regarding contract rights and unfair labor practices, and also as conduct calculated solely for personal gratification and gain rather than fulfilling the duties of her position.

Merrell cites two cases generally for the propositions that a government official acts without legal authority if her actions conflict with the law or acts ultra vires if she misinterprets her own authority and her actions exceed the scope of what is permitted by the law granting her authority. *See Hous. Belt & Terminal Ry.*, 487

S.W.3d at 158; *Hall*, 508 S.W.3d at 241–42. Merrell, however, does not identify the state laws or the unfair labor practices he alleges Mayor Bilski violated. With regard to Merrell’s assertion that Mayor Bilski acted without authority when she and the councilmembers acted in concert to secure his resignation, he points to the following allegations in his petition:

- Mayor Bilski seized on the economic downturn as an opportunity to publicly criticize the City’s recent shift toward economic growth and investment as a source of blame for the City’s recent economic woes. And she made clear that if elected, she would work to slow and/or reverse the expansion of economic development by opposing the initiatives heavily endorsed by Mr. Merrell during his time as City Manager
- Mayor Bilski, flanked by various councilmembers, became fixated on the shortfall itself and began pressing Mr. Merrell for answers to supply a quick fix but ignored his explanations and the data he provided
- the Mayor and various councilmembers began inquiring about Mr. Merrell’s past decisions involving expenditures
- a councilmember began openly questioning Mr. Merrell’s judgment, demanding to know why various employee expenditures had been approved
- a councilmember voiced his concerns about the purchase of a \$500 stove for employees in the planning department
- one councilmember indicated she had budget amendments which she wanted to be placed on the next meeting’s agenda without having consulted or coordinated with Merrell’s office to discuss how those

amendments might affect departmental budgets or the viability of various department heads

The first allegation concerns conduct that occurred before Mayor Bilski was elected and therefore does not constitute conduct of a government official as required for an ultra vires claim. The last three allegations involve conduct by councilmembers and not Mayor Bilski. It is unclear how the remaining two allegations—that Mayor Bilski and councilmembers began pressing Merrell for answers to quickly fix the shortfall and inquiring about Merrell’s past decisions involving expenditures—describes unlawful conduct or conduct designed to secure Merrell’s resignation. *See Brown*, 2021 WL 1997060, at *8 (“[M]erely asserting legal conclusions or labeling a defendant’s actions as ‘ultra vires,’ ‘illegal,’ or ‘unconstitutional’ does not suffice to plead an ultra vires claim—what matters is whether the facts alleged constitute actions beyond the governmental actor’s statutory authority, properly construed.”) (citing *Tex. Dep’t of Transp. v. Sunset Transp., Inc.*, 357 S.W.3d 691, 701–02 (Tex. App.—Austin 2011, no pet.)).

We conclude that Merrell has not alleged a proper *ultra vires* claim against Mayor Bilski. The trial court did not err by granting Appellees' plea to the jurisdiction on this claim.⁷ We overrule Merrell's third issue.⁸

Conclusion

We affirm the trial court's order granting Appellees' plea to the jurisdiction and dismissing Merrell's claims for lack of subject matter jurisdiction.

Veronica Rivas-Molloy
Justice

Panel consists of Justices Landau, Hightower, and Rivas-Molloy.

⁷ As we have concluded that the trial court properly granted the City's plea to the jurisdiction because it lacked subject matter jurisdiction over Merrell's claims, we need not reach Merrell's argument that the trial court erred in granting the City's Rule 91a motion to dismiss on the same basis.

⁸ To the extent Merrell's *ultra vires* claim relies on his claim that he was constructively discharged, such allegations equally could not support his *ultra vires* claim against Mayor Bilski because we have concluded none of his allegations support a constructive discharge claim.